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ARTICLES

Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?

BY JEFFREY F. ADDICOTT*

I. INTRODUCTION

*"In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being."*¹

William H. Rehnquist

As America makes its way through the third year of the "War on Terror,"² a deep fissure runs through the legal commun-

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¹ WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 222 (1998).

² See generally JEFFREY F. ADDICOTT, WINNING THE WAR ON TERROR: LEGAL AND POLICY LESSONS FROM THE PAST 20–32 (2003) (describing "War on Terror"

ity.³ On one side are those who steadfastly maintain that existing laws and processes need no or very minor changes, while others advocate the implementation of significant changes to alter our current legal system's focus from punishing completed crimes to a more aggressive approach capable of preventing terrorist attacks.⁴ Understandably, the pivot in every discussion regards the balance struck between protecting civil liberties⁵ and providing adequate safety to the nation from the threat of terrorism.

Considering that a nuclear truck bomb could obliterate an entire American city and cause a "panicky stampede into truly oppressive police statism in which measures now unthinkable could suddenly become unstoppable," a 2003 Brookings Institute report aptly argued that "[s]tubborn adherence to the civil liberties status quo would probably damage our most fundamental freedoms far more in the long run than would judicious modifications of rules that are less fundamental."⁶ A weapon of mass destruction ("WMD") event in the future could open a Pandora's box filled with draconian security measures.⁷

as more than a mere metaphor, particularly in light of various acts and pronouncements of the executive and legislative bodies of government concerning the use of force as well as the nature and structure of the al-Qáeda virtual State); *see also*, e.g., Prize Cases, 67 U.S. (2 Black) 635 (1862) (rejecting a challenge to President Lincoln's authority to blockade secessionist Southern States without a Congressional declaration of war); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) [hereinafter Joint Resolution Against Iraq]; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the use of force against the Taliban regime) [hereinafter Joint Resolution Against Afghanistan].

³ The United States Supreme Court has agreed to hear a number of pivotal cases in the 2004 term to include the legality of whether an American citizen can be labeled an "enemy combatant" and detained in the United States without trial or access to an attorney. *See* Mark Helm, *Justices to Review "Enemy" Case*, SAN ANTONIO EXPRESS NEWS, Jan. 10, 2004, at A3. *But see* Richard Benedetto, *Most Say War Worth Fighting; Bush Approval at 59%; Polls Show Division Over Whether Troops Should Start Coming Home*, USA TODAY, Aug. 28, 2003, at A8 (highlighting the fact that the polls repeatedly show that the majority of Americans approve of the Bush administration's handling of the War on Terror).

⁴ *See* Stuart Taylor, Jr., *Rights, Liberties, and Security*, 21 BROOKINGS REV. 25 (2003) (advocating steps such as preventive detention).

⁵ Black's defines civil liberty as "[f]reedom from undue governmental interference or restraint." *See* BLACK'S LAW DICTIONARY 239 (7th ed. 1999).

⁶ Taylor, *supra* note 4, at 26.

⁷ *See id.*

Because of the murderous machinations of al-Qāeda styled terrorism,⁸ the government has crafted a variety of robust antiterrorism⁹ responses designed to disrupt the terrorist network and prevent future terrorist attacks from occurring. These measures include passage of the USA Patriot Act;¹⁰ creation of the Cabinet level post of Secretary of Homeland Security and the Department of Homeland Security;¹¹ and establishment of United States Northern Command in Colorado.¹² The United States has also engaged in more controversial actions, such as the use of preemptive military force against rogue states¹³ and the indefinite detention of

⁸ The al-Qāeda terror organization was founded in 1989 by a Saudi named Osama bin Laden. Dedicated to the destruction of the West, the organization has demonstrated over the past three years that it is truly international in scope with the resources and personnel to coordinate sophisticated terror attacks on a scale never before seen. It is linked to a variety of terrorist groups from the Philippines to Indonesia and has trained thousands of Arab and non-Arab militants in Afghanistan under the Taliban regime. Fueled by a super-fundamentalist Islamic radicalism, its foot soldiers of hate gladly embrace death in their continuing quest for mass murder. See Michael Elliott, *Why the War on Terror Will Never End*, TIME, May 26, 2003, at 29.

⁹ See ADDICOTT, *supra* note 2, at 18, 60. Antiterrorism involves all those proactive steps taken to decrease the probability of a terrorist incident. Counterterrorism, contrastingly, involves all those tactical actions taken in response to a terrorist attack. *Id.* at 18.

¹⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. The bill passed the Senate by a landslide vote of 98–1. 147 CONG. REC. S10,990 (daily ed. Oct. 25, 2001). The House of Representatives passed their version by a similar vote of 357–66. 147 CONG. REC. H7224 (daily ed. Oct. 25, 2001).

¹¹ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 [hereinafter Homeland Security Act]; see generally Editorial, *Seeking Homeland Security*, N.Y. POST, June 7, 2002, at 32 (“[T]he new department would incorporate more than 100 different government divisions from eight separate Cabinet departments into a single agency whose sole mission is homeland security.”).

¹² The U.S. Northern Command is located at Peterson Air Force Base in Colorado Springs, Colorado. It was established October 1, 2002, and is the single military headquarters focused on national defense and national assistance following a major natural disaster or man-made attack. There are currently about 500 military and civilian personnel assigned to the new command. See Vince Crawley, *9-11 Means 24/7: Northern Command Scrutinizes All Threats—Man-Made or Natural*, ARMY TIMES, Jan. 19, 2004, at 18.

¹³ See Joint Resolution Against Iraq, *supra* note 2 (linking the use of force against Iraq to Iraq’s support of terrorism).

suspected illegal alien terrorists¹⁴ and enemy combatants.¹⁵ Some have challenged the government's shift in tactical focus from punitive measures against terrorist criminals who engage in aggression to broad preventative methods as being illegal or inconsistent with American values.¹⁶ One issue eliciting tremendous debate in the arena of prevention measures, particularly in light of the Abu Ghraib prison abuse scandal,¹⁷ is whether the United States can and does employ torture or ill-treatment¹⁸ to interrogate

¹⁴ See *infra* notes 101–02 and accompanying text.

¹⁵ See *infra* notes 99, 104–09 and accompanying text.

¹⁶ Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974). The U.N. Definition of Aggression states in main part:

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to . . . article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State . . . ;
- (b) Bombardment by the armed forces of a State against the territory of another State . . . ;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State . . . ;
- (d) An attack by the armed forces of a State on the land, sea, or air forces, or marine and air fleets of another State . . . ;
- (e) The use of armed forces of one State . . . in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State . . . ;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein

¹⁷ See Johanna McGeary, *The Scandal's Growing Stain*, TIME, May 17, 2004, at 26.

¹⁸ See *infra* Part III.

suspected terrorists or enemy combatants. Concern primarily focuses upon the alleged American practice known as “stress and duress” interrogation—the use of various forms and levels of physical and physiological force to extract information. Accompanying this concern is the issue of rendition, in which the United States allegedly sends detainees to third nations where they are subjected to interrogations employing torture or other illegal techniques.¹⁹

Some individuals and interest groups charge that American interrogation practices and treatment of terrorist and enemy combatant detainees involve torture.²⁰ Not every alleged incident of mistreatment necessarily satisfies the legal definition of torture. Therefore, one must view such allegations with a clear understanding of the applicable legal standards set out in law and judicial precedent. In this manner, claims of illegal interrogation practices are properly measured as falling above or below a particular legal threshold. Only then can one hope to set aside the rhetoric and objectively establish whether the United States stands in violation of the rule of law.²¹

Another parallel issue in America’s war against terrorism is how authorities should deal with the so-called “ticking-time-bomb”²² terrorist. The concern is so great that many prominent voices both within and outside of the government advocate a judicial exception allowing torture as an interrogation tool in special instances.²³ Perhaps one of the most unex-

¹⁹ See Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

²⁰ See, e.g., Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Group Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9 (noting that Human Rights Watch accused the United States of violating international law by torturing detainees and turning detainees over to States that engaged in torture).

²¹ Rule of law is defined in Black’s as “a substantive legal principle” and “[t]he doctrine that every person is subject to the ordinary law within the jurisdiction.” See BLACK’S LAW DICTIONARY, *supra* note 5, at 1332.

²² See *infra* Part IV.

²³ See Priest & Gellman, *supra* note 19, at A1 (“[C]urrent national security officials . . . defended the use of violence against captives as just and necessary.”); Brief for Petitioner, *Chavez v. Martinez*, 538 U.S. 760 (2003) (No. 01-1444) [hereinafter *Chavez* Brief for Petitioner] (arguing that the Court should carve out a “terrorist exception” regarding the constitutional parameters surrounding an interrogation); Dermot Purgavie, *As U.S. Decides How to Force an Al Qaeda Leader to Tell His Secrets; Can We Use Torture to Combat Terror?*, DAILY EXPRESS (London), May 20, 2002, at 12 (describing the academic and legal debate

pected voices to advocate such a position is well-known civil libertarian Professor Alan Dershowitz.²⁴

Some might claim that Dershowitz is simply reflecting a new and ugly pragmatism associated with blunting the terrorists. Nevertheless, America cannot allow itself to slip into a Star Chamber²⁵ mentality where the State recognizes torture as a necessary evil. In order to find the appropriate balance between civil liberties and security concerns, the purpose of this Article is twofold. First, this Article measures interrogation practices used by the United States to get information from various categories of detainees in light of both the domestic and international laws on torture and other forms of mistreatment. In other words, is the United States using illegal interrogation methods in the War on Terror, as has been charged? Second, in the special case of the "ticking-time-bomb" terrorist, should the United States openly disregard the rule of law and officially sanction the use of torture?

II. DEFINING TORTURE

*"The screw may twist and the rack may turn,
And men may bleed and men may burn . . ."*²⁶
W.S. Gilbert

Torture as a State instrument to either punish or extract information from certain individuals has a long and dark history which need not be recounted here.²⁷ In the West, one usually traces the practice to the

over torture); Peter Slevin, *U.S. Pledges Not to Torture Terror Suspects*, WASH. POST, June 27, 2003, at A1.

²⁴ See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 141 (2002) [hereinafter DERSHOWITZ, *WHY TERRORISM WORKS*]. Dershowitz argues that allowing torture after "advance judicial approval" would reduce the amount of torture, make it publicly accountable, and "maximize civil liberties." *Id.*

²⁵ See DAVID HARRIS WILLSON, *A HISTORY OF ENGLAND* 227–29 (1967). The Star Chamber was developed under Henry VII (1485–1509). It consisted of some twenty to thirty councilors to the King who were given extraordinary power to judge certain cases without the use of jury. "It put men under oath and forced them to answer questions that might incriminate them." *Id.* at 228.

²⁶ WILLIAM S. GILBERT & ARTHUR SULLIVAN, *YEOMEN OF THE GUARD: OR THE MERRYMAN AND HIS MAID* (G. Schirmer ed., 1986) (1888).

²⁷ See generally JAMES HEATH, *TORTURE AND ENGLISH LAW* (1982); JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME* (1977) (discussing the State-sanctioned use of torture in ancient

Romans who codified the use of torture as part of the Roman criminal law.²⁸

In England the earliest authoritative records regarding the State use of torture appear in the Privy Council registers in the year 1540 and extends, with some gaps in the reports, for a hundred years.²⁹ The Crown issued less than one hundred official warrants, an amazingly low figure relative to the number of felony investigations in any given year.³⁰ This low statistic demonstrates that torture was predominantly used for interrogation and not for punishment.³¹ The 1597 case of Jesuit priest John Gerard typifies the goal of torture. The Crown's warrant in Gerard's case directed that he be tortured in the Tower of London by means of "the manacles"³² and other "such torture" as necessary to make Gerard "utter directly and truly his uttermost knowledge"³³ concerning certain traitors to the Crown.

Europe and England).

²⁸ See EDWARD PETERS, *TORTURE* 28 (1966) (describing the Roman uses of torture in the investigative process).

²⁹ See LANGBEIN, *supra* note 27, at 93–99.

³⁰ HEATH, *supra* note 27, at 82.

³¹ *Id.* at 74–79, 93–98, 109–21 (noting that only about a quarter of the torture warrants dealt with common felony crime where the goal of torture was primarily evidentiary).

³² *Id.* at 183–84. This refers to the practice of hanging a person by his wrists suspended off the ground. The "rack," however, was the most preferred form of torture. It involved stretching the subject on a wooden platform.

³³ *Id.* at 226. The complete warrant issued by the Crown reads as follows: A letter to Sir Richard Barkly, Lieutenant of the Tower. Mr. Solicitor, Mr. Bacon and William Waad, esquire. You shall understand that one Gerratt [Gerard], a Jesuite, by her Majesty's commandment is of late committed to the Tower of London for that yt hath been discovered to her Majestie [that] he verie latelie did receive a packet of letters out of the Lowe Countr which are supposed to come out of Spayne, [he] being noted to be a great intelligencer and to holde correspondence with Parsons the Jesuite and other traitors beyond the seas. These shalbe therefore to require you to examyne him strictlie upon such interrogatories as shalbe fitt to be [ad]ministered unto him and he ought to answer to manyfest the truthe in that behalf and other things that may concern her Majesty and the State, wherein yf you shall find him obstinate, undutyfull, or unwilling to declare and reveale the truthe as he ought to do by his duty and allegeance, you shall by virtue hereof cause him to be put to the manacles and suche other torture as is used in that place, that he may be forced to utter directlie and truly his uttermost knowledg in all these things that maie any waie concerne her Majesty and the State and are meet to be knowne.

Id.

Today, torture is universally prohibited,³⁴ both by fixed law and customary practice.³⁵ Many States have ratified the various international agreements associated with banning torture.³⁶ Nevertheless, even though no State allows torture in its domestic law,³⁷ the practice continues to flourish. Governments in approximately more than sixty countries and territories torture various prisoners and detainees.³⁸ Add to this paradox the dilemma that some of the acts that should clearly constitute torture do not enjoy a uniformity of definition within the international community. As one legal commentator rightly pointed out: "The prohibition of torture . . . is not, itself, controversial. The prohibition in application, however, yields endless contention as each perpetrator seeks to define its own behavior so as not to violate the ban."³⁹

A. *International Agreements*

Prior to exploring the international legal definition of torture, it is useful to survey the general understanding of the term. Torture comes from the Latin verb "torquere" (to twist) and is defined in leading dictionaries as follows: "Infliction of severe physical pain as a means of punishment or coercion;"⁴⁰ "The act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer

³⁴ See Winston P. Nagen & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87 (2001). But see Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U.—DCL J. INT'L L. 1, 28 (2000) (arguing that torture has not become a matter of customary international law because it is not uniformly defined).

³⁵ Customary international law consists of all those binding norms practiced by nations. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

³⁶ See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2003), at <http://www.unhchr.ch/pdf/report.pdf>. As of November 2, 2003, fifty-seven States had ratified the Torture Convention, and an additional sixty-one had signed it. *Id.*

³⁷ See NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 74 (2d ed. 1999) (finding that no State allows torture under its domestic law).

³⁸ Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 308 (2000).

³⁹ *Id.*

⁴⁰ THE AMERICAN HERITAGE COLLEGE DICTIONARY 1452 (4th ed. 2002).

cruelty;”⁴¹ “The infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure.”⁴²

The essential elements in these definitions are (1) the infliction of severe pain to the body or mind (2) used to punish or obtain information. International law adopts and sharpens this basic formula. International law stipulates that only State actors may be guilty of torture.⁴³ Under this definition, certain criminals may torture their victims when committing a particularly gruesome murder,⁴⁴ but these non-State actors carrying the same crime may not violate the international law on torture. Additionally, international law expands the prohibition of torture to include other less abusive acts commonly called “other acts of cruel, inhuman, or degrading treatment or punishment,” or simply “ill-treatment.”⁴⁵

Like the concept of human rights, international law said little about the practice of State torture until the close of World War II.⁴⁶ After the United Nations was established in 1945, nations came together and crafted a series of international declarations and agreements based on the human rights ideals embodied in the United Nations Charter.⁴⁷ The prohibition of torture and ill-treatment are core rights found in the most important of these documents.

⁴¹ RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1999 (2d ed. 1987).

⁴² BLACK’S LAW DICTIONARY, *supra* note 5, at 1498.

⁴³ See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Reg. 39146, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51/Annex (1984) [hereinafter *Torture Convention*] (indicating torture must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official”).

⁴⁴ See, e.g., *State v. Anderson*, 484 S.E.2d 543 (N.C. 1997). The defendant was convicted of first degree murder by torture for beating victim, using soldering iron on victim’s arm, using aerosol torch on victim’s genital area, carving derogatory term into victim’s arm, and binding and gagging victim in trailer home’s closet where victim expired. *Id.*

⁴⁵ See *Torture Convention*, *supra* note 43, at 198 (article 16(1)); see also *infra* notes 61–64 and accompanying text.

⁴⁶ See Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT’L & COMP. L. REV. 275, 289–90 (1994) (arguing that it was the Nazi atrocities that prompted the world to protect human rights).

⁴⁷ See U.N. CHARTER, art. 1, § 3. One of the primary purposes of the United Nations is “promoting and encouraging respect for human rights and for fundamental freedoms for all.” *Id.*

Article 5 of the 1948 Universal Declaration of Human Rights serves as the foundation for all subsequent international agreements on torture.⁴⁸ Article 5 of the Declaration says in one brief sentence that “[no] one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁴⁹ After adopting the Universal Declaration of Human Rights, the U.N. passed the widely influential and legally binding International Covenant on Civil and Political Rights.⁵⁰ In pertinent part, Article 7 of the Covenant utilizes the exact same language found in the Universal Declaration of Human Rights.⁵¹ Before ratifying the International Covenant on Civil and Political Rights, the United States Senate sought to clarify the meaning of Article 7. The Senate achieved this through a reservation which defined “cruel, inhuman or degrading treatment or punishment” as “the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”⁵²

In 1975, the United Nations adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵³ This document, though only a declaration, served as the basis for the 1984 United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”), which was the primary international agreement governing torture and ill-treatment.⁵⁴ The Torture Convention more fully addressed a previous source of controversy—the distinction

⁴⁸ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

⁴⁹ *Id.*

⁵⁰ *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). The International Covenant on Civil and Political Rights was opened for signature, ratification, and accession on Dec. 16, 1966 and entered into force on Mar. 23, 1976, in accordance with art. 49. *Id.*

⁵¹ *Id.* at 53. The second part of Article 7 states: “In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” *Id.*; see also Lippman, *supra* note 46, at 288 (noting that this section was added in response to “[t]he Nazis engag[ing] in a series of unprecedented, gruesome medical experiments on concentration camp inmates”).

⁵² 136 CONG. REC. 517, 486 (1990).

⁵³ *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/RES/3452(XXX) (1975).

⁵⁴ *Torture Convention*, *supra* note 43, at 197.

between “torture” and “other acts of cruel, inhuman, or degrading treatment or punishment.”⁵⁵ While previous documents prohibited both types of treatment, the Torture Convention defined the obligations and consequences attendant to each type of act for the first time.⁵⁶ Still, the Torture Convention did not exhibit the same care in defining what it meant by “other cruel, inhuman or degrading treatment or punishment” as it did in defining torture.⁵⁷ The Torture Convention defines torture as follows:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of . . . a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁵⁸

In adopting the Torture Convention, the United States Senate clarified the meaning of the convention by adopting reservations requiring specific intent and better defining the concept of mental suffering:

[T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁵⁹

⁵⁵ *Id.* at 197–98.

⁵⁶ *See id.*

⁵⁷ *Id.* at 198.

⁵⁸ *Id.* at 197.

⁵⁹ 136 CONG. REC. S17, 491 (1994).

The Torture Convention is strict in its ban on torture. Article 2 of the Torture Convention absolutely excludes exceptional circumstances as an exception to the prohibition of torture, stating that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.”⁶⁰

As noted, the phrases “other acts of cruel, inhuman or degrading treatment or punishment”⁶¹ and “ill-treatment”⁶² are not defined in the Torture Convention.⁶³ In fact, the Torture Convention only addresses ill-treatment in Article 16 and merely obliges each State party to the document to “undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment.”⁶⁴

The goal of the Torture Convention is to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”⁶⁵ The distinction between torture and ill-treatment is best viewed as two sides of the same formula, with torture, quite understandably, being predominate. Clearly, a greater stigma is associated with the insidious evil of torture so that all intuitively realize that international law forbids torture, even if few are cognizant of the fact that ill-treatment is also prohibited. While all acts of torture must necessarily include ill-treatment, not all acts of ill-treatment constitute torture. Interrogation practices that do not rise to the level of ill-treatment may be repugnant by degree, but would be perfectly legal under international law.⁶⁶ It is thus efficacious to begin the discussion by pointing out the differences between torture and ill-treatment as they have significant ramifications regarding State Party obligations.

Article 3 of the Torture Convention prohibits any State Party from “expel[ling], return[ing] (*“refouler”*) or extradit[ing] a person to another State where there are substantial grounds” to believe that the person will be subjected to torture.⁶⁷ In making this determination, the State Party is required “take into account all relevant considerations” with particular regard to whether there exists “a consistent pattern of gross, flagrant or

⁶⁰ *Torture Convention*, *supra* note 43, at 197. Article 2 also states that superior orders may not be invoked as a defense to torture. *Id.*

⁶¹ *Id.* at 198.

⁶² *See, e.g.*, Grosso, *supra* note 38, at 308.

⁶³ *Torture Convention*, *supra* note 43, at 198.

⁶⁴ *Id.*

⁶⁵ *Id.* at 197.

⁶⁶ *See infra* notes 198–99, 296–98, and accompanying text.

⁶⁷ *Torture Convention*, *supra* note 43, at 198.

mass violations of human rights.”⁶⁸ Although this standard provides considerable flexibility for a State Party to justify particular interpretations, the prohibition at least establishes a standard.⁶⁹ Contrastingly, Article 16 has no similar requirement regarding ill-treatment.⁷⁰ This means that under the Torture Convention a State Party may freely hand over an individual to a State that it knows engages in ill-treatment.

Additionally, Article 4 requires each State Party to ensure that torture is a criminal offense under its domestic criminal law,⁷¹ and Article 12 dictates each State Party to investigate any torture allegations under its jurisdiction when reasonable grounds exist to believe that such acts have occurred.⁷² Article 7 further requires the State Party to either extradite the alleged torturer or “submit the case to its competent [domestic] authorities for the purpose of prosecution.”⁷³ Article 15 excludes from evidence all statements elicited through torture,⁷⁴ while Article 14 requires the State Party to make compensation to the victims of torture.⁷⁵

Article 16 does not require the criminalization of ill-treatment in domestic penal codes, the prosecution of individuals charged with ill-treatment, or limitations on interpretation.⁷⁶ Article 16 additionally does not require compensation for the victims of ill-treatment or the exclusion of statements obtained from ill-treatment as evidence at a criminal trial.⁷⁷ According to one commentator, “[t]he failure to strengthen article 16 appears to have been based on a belief that the concept of cruel, inhuman or degrading treatment or punishment was too vague a legal standard upon which to base legal culpability and judgments.”⁷⁸

The inherent vagueness of ill-treatment’s definition and the Torture Convention’s reluctance to fully define the concept or provide even a minimum level of sanction to the practice has been further aggravated by the controversial and often cited European Court of Human Rights ruling

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* A statement obtained through torture, however, may be used in the trial of an individual charged with that torture. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Lippman, *supra* note 46, at 319.

in *Ireland v. United Kingdom*.⁷⁹ The *Ireland* court found certain interrogation practices of English authorities investigating suspected terrorism in Northern Ireland to be “inhuman and degrading” (i.e., ill-treatment) under the European Convention on Human Rights, but not severe enough to rise to the level of torture.⁸⁰ According to the court, the finding of ill-treatment rather than torture “derives principally from a difference in the intensity of the suffering inflicted.”⁸¹ The judgment of the *Ireland* court involved the use of five interrogation techniques used by British authorities.⁸² These techniques included:

- Wall-standing: forcing the detainees to stand for some period of hours in a “stress position” described as “spreadeagled against the wall, with . . . fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers.”⁸³ Wall-standing was practiced for up to 30 hours with occasional periods for rest.⁸⁴
- Hooding: placing a dark hood over the head of the detainee and keeping it on for prolonged periods of time, removing it only for interrogation.⁸⁵
- Deprivation of sleep: depriving detainees of sleep for prolonged periods of time.⁸⁶
- Deprivation of food and drink: reducing the food and drink to suspects pending interrogations.⁸⁷

Finally, real world enforcement mechanisms to ensure compliance with the Torture Convention’s prohibition on torture and ill-treatment are wholly

⁷⁹ *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25 (1978).

⁸⁰ *Id.* at 79–80 (noting the distinction in Article 3 of the European Convention on Human Rights between torture and inhuman or degrading treatment).

⁸¹ *Id.* Of the seventeen judges on the panel, thirteen held that the five techniques did not constitute torture. *See id.* at Holding I.4. Sixteen of the judges held that the five techniques were “ill-treatment.” *See id.* at Holding I.3.

⁸² *See id.* at 59. These techniques were used for four or five days at a time. *See Emanuel Gross, Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT’L LAW & FOREIGN AFF. 89, 129 (2001).

⁸³ *Ireland*, 2 Eur. H.R. Rep. at 59.

⁸⁴ *See Gross, supra* note 82, at 131.

⁸⁵ *Ireland*, 2 Eur. H.R. Rep. at 59.

⁸⁶ *Id.*

⁸⁷ *Id.*

inadequate. This is because the individual State Party is expected to police itself and, if this fails, the only remaining hope for meaningful pressure is international condemnation from the court of world opinion.⁸⁸ While the Torture Convention created an investigatory body called the Committee Against Torture, its responsibilities revolve around a complex maze of reports and recommendations which have generally accomplished very little.⁸⁹ The biggest stick wielded by the Committee Against Torture is the threat that it may provide an unfavorable summary of a particular country in its yearly report.⁹⁰ As always, the chief enforcement tool in a democracy is the rule of law coupled with the judgment of its citizens; civilized peoples are repulsed by the concept of torture and ill-treatment. Levels of compliance in totalitarian regimes, however, are dismal with any minimal progress achieved only through the pressure that democracies may apply via economic or political leverage.

B. United States Domestic Law

The United States has its own history of using torture and ill-treatment to elicit confessions in criminal investigations, particularly in the early part of the last century. By 1931, torture by local law enforcement had become so common that a special government fact finding body, the National Commission on Law Observance and Enforcement (the Wickersham Commission), was established to investigate the matter.⁹¹ The Commission issued a report detailing abusive police interrogation practices.⁹²

Federal law currently defines torture as “an act committed by a person acting under the color of the law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”⁹³

While domestic acts of torture are punishable as common law crimes, Section 2340A makes it a federal offense for an American national to

⁸⁸ See Lippman, *supra* note 46, at 320–21 (describing State Parties’ limited reporting obligations).

⁸⁹ See *id.* at 319–24.

⁹⁰ See *Torture Convention*, *supra* note 43, at 200.

⁹¹ See NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

⁹² See *id.*

⁹³ 18 U.S.C. § 2340 (2003).

commit or attempt to commit torture outside the United States.⁹⁴ Additionally, in 1992 Congress passed the Torture Victim Protection Act of 1991 that opened United States courts to civil law damage suits by any individual "who, under actual or apparent authority, or color of law, of any foreign nation," violates international law regarding torture.⁹⁵ The Act defines torture as follows:

[A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind⁹⁶

III. ALLEGATIONS OF UNITED STATES SANCTIONED TORTURE

*"The [Americans] are engaging in good-old fashioned torture, as people would have understood it in the Dark Ages."*⁹⁷

Richard Bourke

⁹⁴ *Id.* § 2340A. The statute states in part:

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

Id.

⁹⁵ Torture Victim Protection Act of 1991, Pub. L. 102-256, § 2, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2003)).

⁹⁶ *Id.* § 3.

⁹⁷ Foreign Staff, *U.S. Tortures Camp X-ray Suspects, Says Lawyer*, SCOTSMAN, Oct. 9, 2003 (quoting Richard Bourke); see *Terror Suspects Tortured Claim AAP*, MERCURY (Hobart, Australia), Oct. 9, 2003, at WL 65804870. Richard Bourke is an Australian lawyer based in the United States who works with detainees at Camp X-Ray. See generally Jim Puzzanghera, *Lindh to Seek Release Today at the Taliban Fighter's Bail Hearing, His Attorneys Will Argue That He Was Held in "Highly Coercive" Conditions After Capture*, SAN JOSE MERCURY NEWS, Feb. 6, 2002, at A1 (claiming John Walker Lind had been kept in a metal shipping container, blindfolded, and immobilized by hand and foot shackles and duct tape that bound his naked body to a stretcher).

Law enforcement possesses four means to achieve the goal of an antiterrorism effort—stopping or eliminating the terrorists before they commit attacks: (1) using informants and undercover agents to infiltrate the terror cell (known as HUMINT sources);⁹⁸ (2) using surveillance, searches and wiretaps to learn of locations, organizational structure, and plans for future attacks; (3) arresting and detaining terrorists before they commit a terrorist attack; and (4) interrogating terrorists. This section only focuses upon the fourth method, interrogation of those detained as suspected terrorists.

Since the War on Terror began, the United States has detained hundreds of individuals that can be grouped into one of four categories: (1) those suspected of having links to al-Qáeda and other terror movements; (2) those designated as enemy combatants;⁹⁹ (3) those detained as prisoners of war in the Iraq military campaign; and (4) those who have been apprehended since the close of major combat operations in Iraq and designated as “security detainees.”¹⁰⁰ Most of those detained in the first category were apprehended by federal law enforcement personnel on the heels of the September 11, 2001 attacks,¹⁰¹ and, after questioning, almost five hundred

⁹⁸ But see Kevin Johnson & Toni Locy, *FBI Says it Can't Infiltrate al-Qaeda*, USA TODAY, Sept. 11, 2003, at A1 (discussing the reasons that the FBI is unable to place undercover agents into the al-Qáeda terror network).

⁹⁹ “[M]ore than 3,000 al Qa’eda operatives and associates have been detained in more than 100 countries” since the terrorist attacks of September 11, 2003. Richard A. Serrano & Greg Miller, *100 Terrorist Attacks Thwarted*, U.S. Says, L.A. TIMES, Jan. 11, 2003, at A12.

¹⁰⁰ Ian Fisher, *8 Mystery Detainees Held, Six Claim They're Americans, Other 2 Say They're British*, SAN DIEGO UNION TRIB., Sept. 17, 2003, at A5 (indicating that as of September 2003 as many as 4400 people are being held as “security detainees”).

¹⁰¹ See generally ADDICOTT, *supra* note 2. A week after the terror attacks of September 11, 2001, Congress by joint resolution, passed by every member of the Congress save one, specifically authorized the President of the United States to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Joint Resolution Against Afghanistan, *supra* note 2, § 2(a).

were deported as illegal aliens.¹⁰² The vast majority of those in the third group have since been released.¹⁰³

Detainees in the second group are members or supporters of the al-Qáeda network captured on the battlefields of Afghanistan, although the United States has also apprehended other suspected al-Qáeda members in places other than military combat zones.¹⁰⁴ At least two enemy combatants, Ali Saleh Kahlah Al-Marri¹⁰⁵ and Jose Padilla,¹⁰⁶ have been arrested in the United States.¹⁰⁷ Most of the individuals in the second category are currently housed in several locations outside the territorial United States, including Guantanamo Bay, Cuba; Afghanistan; and Diego Garcia.¹⁰⁸ Those in the fourth group are being held in Iraq during its reconstruction.

The second and fourth group of individuals—enemy combatants and security detainees—have generally been subjected to extended interrogation, but few have been released from detention.¹⁰⁹ Apart from concerns regarding interrogation methods used on these individuals, this situation has produced a central concern regarding whether the United States can detain these individuals indefinitely without trial or access to counsel.

¹⁰² Greg Krikorian, *When in Doubt, Kick Out? FBI Teams Track Immigrant Terrorism Suspects at Great Cost, Yet They May Not Find Conclusive Evidence. Deportation Emerges as Quick Fix*, L.A. TIMES, Oct. 30, 2002, at A1.

¹⁰³ Telephone Interview with Colonel Bill Hudson, Jr., Staff Judge Advocate, United States Army Third Infantry Division (Jan. 9, 2004).

¹⁰⁴ See, e.g., Associated Press, *U.S. Removes Five From Malawi*, WASH. POST, June 26, 2003, at A26 (noting that five alleged terrorist financiers were flown out of Malawi by U.S. agents); Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1 (reporting that U.S. forces had apprehended five Algerians and a Yemeni in Bosnia and taken them to Guantanamo Bay).

¹⁰⁵ See Kevin Johnson, *Al-Qaeda Suspect Moved to Military Custody*, USA TODAY, June 24, 2003, at A3. Al-Marri is a Qatari national being held in a Navy brig in Charleston, South Carolina. See *id.*

¹⁰⁶ See Serrano & Miller, *supra* note 99.

¹⁰⁷ A third American citizen designated as an enemy combatant is Yaser Esam Hamdi. Hamdi is being held in Norfolk, Virginia at the Navy brig. See Laura Taylor Swain, *Liberty in the Balance: The Role of the Third Branch in a Time of Insecurity*, 37 SUFFOLK U.L. REV. 51, 59–60 (2004).

¹⁰⁸ Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 54 (noting twelve countries in which detainees are being held).

¹⁰⁹ Ordinarily, the law of war requires that prisoners be released upon the cessation of hostilities. See DEPARTMENT OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE XVII (1956), <http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/> [hereinafter FM 27-10].

There have been several legal challenges to the Bush administration's designation and handling of the detainees, particularly at Guantanamo Bay, Cuba. Although the majority of the federal courts hearing these challenges have upheld the administration's view of the terrorism cases,¹¹⁰ the United States Supreme Court has granted certiorari to several key cases, with decisions expected in summer 2004.¹¹¹ The central claim in all of these disputes centers on the status and detention issues.

A group of clergy, lawyers, and academics brought one of the first legal challenges in a California federal court in 2002. In *Coalition of Clergy, Lawyers, and Professors v. Bush*, the plaintiff group sought habeas corpus relief on behalf of the detainees.¹¹² The district court held that the plaintiff group lacked standing to raise the issue,¹¹³ and hinted in a footnote that the Supreme Court's holding in *Johnson v. Eisentrager*¹¹⁴ would serve as a "formidable obstacle" to granting habeas corpus relief for the detainees since they were aliens being held outside the geographic borders of the United States.¹¹⁵ The U.S. Court of Appeals for the District of Columbia rejected a similar claim for habeas corpus relief on procedural grounds in *Al Odah v. United States*.¹¹⁶ The *Al Odah* Court specifically cited *Johnson* and found that "Cuba—not the United States—has sovereignty over Guantanamo Bay."¹¹⁷ Nevertheless, the Ninth Circuit Court of Appeals

¹¹⁰ See James Gordon Meek, *Supremes to Rule on Gitmo Detainees*, N.Y. DAILY NEWS, Nov. 11, 2003, at 10 (noting that the lower federal courts have so far deferred to the Executive Branch in the prosecution of the War on Terror).

¹¹¹ See Lyle Denniston, *High Court Accepts Case on Detention of US Citizens*, BOSTON GLOBE, Jan. 10, 2004, at A1.

¹¹² *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002).

¹¹³ *Id.* at 1164.

¹¹⁴ *Id.* (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). The *Johnson* case involved habeas corpus relief for German spies captured in China and imprisoned in Germany after the close of World War II. The Supreme Court held that German nationals, confined in custody of United States Army in Germany following conviction by military commission of having engaged in military activity against United States in China after surrender of Germany, had no right to writ of habeas corpus to test legality of their detention. *Johnson*, 339 U.S. at 778.

¹¹⁵ See *Coalition of Clergy*, 310 F.3d at 1164 n.4 ("There is no question that the holding in *Johnson* represents a formidable obstacle to the rights of the detainees at Camp X-Ray to the writ of habeas corpus; it is impossible to ignore, as the case well matches the extraordinary circumstances here.")

¹¹⁶ *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 124 S. Ct. 534 (2003).

¹¹⁷ *Id.* at 1143. The United States gained control over Guantanamo Bay pursuant to a 1934 treaty. See *id.* at 1142.

ruled in December 2003 that the Guantanamo Bay detainees can have access to American courts.¹¹⁸ The Supreme Court will resolve this issue when it renders its decision in a similar case involving a request by several families of Guantanamo Bay detainees who want to be allowed access to United States courts to contest the detainees' status and detention.¹¹⁹

In *Hamdi v. Rumsfeld*, the Fourth Circuit reaffirmed the proposition that the President has the constitutional authority to designate and detain "enemy combatants," including those who are American citizens, in time of war.¹²⁰ If one accepts the proposition that the War on Terror is not a metaphor but a real state of war, then it is fundamentally clear that the President can use his Article II powers to designate and then detain enemy combatants, including those who are United States citizens. During World War II, for instance, the United States detained hundreds of thousands of German, Italian, and Japanese prisoners, some of whom were American citizens, for years without counsel, access to family, or trial.¹²¹

The purpose of detaining enemy combatants is not to punish the enemy combatant, but to protect the holding nation from future acts of violence by

¹¹⁸ See *Gherebi v. Bush*, 352 F.3d 1278, 1284 (9th Cir. 2003). For an excellent discussion, see John Mintz, *Hearing Ordered for Terrorism Detainee; 9th Circuit Ruling Could Lead to Court Dates for Others at Guantanamo Bay*, WASH. POST, Dec. 19, 2003, at A19.

¹¹⁹ *Rasul v. Bush*, 124 S. Ct. 534 (2003). The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this consolidated case was granted and limited to the issue: "Whether United States Courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *Id.*

¹²⁰ *Hamdi v. Rumsfeld*, 296 F.3d 278, 281, 283 (4th Cir. 2002), *cert. granted*, 124 S. Ct. 981 (2004). In *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003), the court concluded that a declaration submitted by the Under Secretary of Defense for Policy "setting forth what the government contends were the circumstances of Hamdi's capture was sufficient by itself to justify his detention . . . [and] that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution." *Id.*; see also *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not divest the [Military] Commission of jurisdiction over him, or confer upon him any constitutional rights not accorded any other belligerent under the laws of war."); *In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946) ("[I]t is immaterial to the legality of petitioner's detention as a prison of war . . . whether petitioner is or is not a [U.S.] citizen."); *Padilla v. Bush*, 233 F. Supp. 2d 564, 587-91 (S.D.N.Y. 2002), *cert. granted*, 124 S. Ct. 1353 (2004) (detention of American citizens designated as enemy combatants).

¹²¹ See *Ex parte Quirin*, 317 U.S. 1, 31, 37 (1942).

ensuring that they do not return to join enemy forces, and, in this unique situation, to allow American officials the opportunity to gather any necessary intelligence about the terrorist's organizational infrastructure, financial networks, communication systems, weapon supply lines, and plans for future terror attacks.¹²²

In short, the Supreme Court's 2004 decisions will turn on whether or not it accepts the premise that America is "at war." If it does, the Court will likely resolve these matters in the government's favor, granting terrorists and other unlawful combatants who violate the laws of war no greater protections than would be accorded to enemy prisoners of war.

The group of detainees that has received the most attention consists of the 600 plus men held at a specially built facility named Camp Delta in Guantanamo Bay, Cuba. Although the Bush administration says all of the detainees are participants in the War on Terror, it has not recognized their eligibility for prisoner of war status under the Third Geneva Convention.¹²³ The Third Geneva Convention does not apply because both the Taliban fighters and the al-Qáeda fighters fail to qualify as lawful enemy combatants under the applicable provisions of international law.¹²⁴ Prisoner of war status is conferred on individuals who are "[m]embers of the armed forces of a Party to the conflicts"¹²⁵ as well as "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party . . . provided that such . . . fulfill[s]" four specific conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly; and
- (d) That of conducting their operations in accordance with the laws and customs of war.¹²⁶

¹²² See FM 27-10, *supra* note 109, ¶ 97.

¹²³ See Geneva Convention, Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, <http://www.unher.ch/html/menu3/b/91.htm> [hereinafter Third Geneva Convention].

¹²⁴ See *United States v. Lindh*, 212 F. Supp. 2d 541, 557–58 (E.D. Va. 2002) (finding that the Taliban fighters who fought on behalf of the government of Afghanistan did not qualify for lawful combatant status); *Padilla*, 233 F. Supp. 2d at 568–69. In the case of New York-born Jose Padilla, the so-called "dirty bomber" was arrested as a material witness but later designated as an "enemy combatant" by the President of the United States. *Id.*

¹²⁵ Third Geneva Convention, *supra* note 123, at art. 4A.

¹²⁶ *Id.*

Although the armed conflict against the al-Qáeda involves the use of American armed force against an organization that is not another nation's armed force, the Bush administration¹²⁷ nevertheless rightly recognized that the Geneva Conventions of 1949 applied in the combat operations in Afghanistan, but that the enemy al-Qáeda detainees were not entitled to prisoner of war status,¹²⁸ since they are not recognized members of an armed force meeting the four criteria set out above.¹²⁹ Even in the best light possible, these individuals are "illegal enemy combatants"¹³⁰—still responsible for breaches of the law of war but not entitled to prisoner of war status.

Similarly, the Bush administration deemed that the captured Taliban fighters were unlawful combatants because they did not "wear distinctive military insignia, i.e., uniforms which would make them distinguishable from the civilian population at a distance."¹³¹ The Bush administration further found that the Taliban forfeited any claim to prisoner of war status because they had "adopted and provided support to the unlawful terrorist objectives of the al-Qáeda."¹³²

¹²⁷ The President alone is invested with the entire charge of conducting hostile operations during wartime, including the power to determine whether a particular person should be declared an enemy combatant. *See generally* *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874); *see also* *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950).

¹²⁸ The Geneva Conventions come into effect in the event of an international armed conflict regardless of how domestic law characterizes that conflict. *See generally* ADDICOTT, *supra* note 2, at 62–63. *But see* Erwin Chemerinsky, *By Flouting War Laws, U.S. Invites Tragedy*, L.A. TIMES, Mar. 25, 2003, at B1 (arguing that the United States is in clear violation of international law).

¹²⁹ The United States has not ratified the Protocol Additional to the Geneva Conventions of Aug. 12, 1946, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, <http://www.unhcr.ch/html/menu3/b/93.htm>. Commonly known as Protocol I, this instrument seeks to extend coverage of non-international conflicts in which "persons are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights to self-determination." *Id.* at art. 1.4. *See* Abraham Sofaer, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AM. J. INT'L L. 784 (1988).

¹³⁰ The term "illegal enemy combatants" is taken from *Ex Parte Quirin*, 317 U.S. 1 (1943). The unlawful combatants in *Quirin* were German saboteurs who entered the United States surreptitiously and proceeded, without wearing distinctive uniforms, to engage in sabotage. All were subsequently captured and tried by an American military commission for violating the law of war. *Id.* at 20–22.

¹³¹ ADDICOTT, *supra* note 2, at 63.

¹³² *But see id.* (arguing that the adoption of the goals of the al-Qáeda would not deprive the Taliban of prisoner of war status).

In *Padilla v. Bush*, the District Court adopted the Bush administration's analysis when it considered the status of Jose Padilla,¹³³ an American citizen arrested in Chicago and detained as an enemy combatant.

[T]he President designated Padilla an "enemy combatant" based on his alleged association with al Qaeda and on an alleged plan undertaken as part of that association. The point of the protracted discussion immediately above is simply to support what should be an obvious conclusion: when the President designated Padilla an "enemy combatant," he necessarily meant that Padilla was an *unlawful combatant*, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents. . . . [E]ven the Taliban militia, who appear at least to have acted in behalf of a government in Afghanistan, were found by Judge Ellis in *Lindh* not to qualify for lawful combatant status.¹³⁴

The Second Circuit, however, ordered the Pentagon in December 2003 to release Padilla, who had been held in military confinement since July 2003.¹³⁵ The United States appealed the order, and the Supreme Court has agreed to hear the appeal.¹³⁶

Despite the fact that the Third Geneva Convention does not apply to these enemy combatants, the Bush administration has pledged that all detainees will be treated in accordance with the humanitarian concerns set out in the Geneva Conventions.¹³⁷ The detainees accordingly receive regular visits by the International Committee of the Red Cross, diplomats from their respective nations, military attorneys, and various other fact-finding groups.¹³⁸

¹³³ Padilla is suspected of being an al-Qaëda member plotting an attack on the United States with a "dirty" bomb.

¹³⁴ *Padilla v. Bush*, 233 F. Supp. 2d 564, 593 (S.D.N.Y. 2002) (citations omitted) (emphasis added).

¹³⁵ *Padilla v. Rumsfeld*, 352 F.3d 695, 718 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1168 (2004) (holding that absent specific congressional authorization the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat).

¹³⁶ *Id.*

¹³⁷ ADDICOTT, *supra* note 2, at 63.

¹³⁸ *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153 (2002). The Ninth Circuit noted that the detainees received visits by the Red Cross and diplomats from their respective countries. *Id.* at 1157; Telephone Interview with Colonel Manuel Supervielle, Staff Judge Advocate for the United States Southern Command (Apr. 5, 2003).

The precise status of “enemy combatant” is pivotal in determining what interrogation techniques can be used to gather information from the subject detainee. Article 17 of the Third Geneva Convention provides that prisoners of war are only required to give their “surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”¹³⁹ The prisoner of war is not required to give any further information upon questioning.¹⁴⁰ To leave no doubt on this point, Article 17 goes on to provide the following:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be *threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind*.¹⁴¹

Certainly, if the Third Geneva Convention covers detainees, American authorities would not be entitled to interrogate them or obtain additional information. Conversely, enemy combatants who are not prisoners of war do not benefit from the Third Geneva Convention’s protections and may therefore be further questioned by American interrogators.

One allegation that has not received treatment in any American court is the charge of torture or ill-treatment by American officials of certain detainees. These claims generally regard the issue of interrogations, but also extend to criticisms of the detainees’ living conditions.¹⁴² Some have claimed that even if the detainees may be held and questioned, the process of deciding what to do with more than 600 detainees in Guantanamo Bay is far too lengthy.¹⁴³ Secretary of Defense Donald Rumsfeld has responded that the process of determining what to do with each detainee is slow because each case must be reviewed by various federal agencies including the Central Intelligence Agency (“CIA”) and the Federal Bureau of Investigation (“FBI”).¹⁴⁴ Still, Rumsfeld has pledged that yearly reviews are planned for the Guantanamo detainees.¹⁴⁵

¹³⁹ Third Geneva Convention, *supra* note 123, art. 17, 75 U.N.T.S. at 148.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (emphasis added).

¹⁴² See Kate Randall, *US Subjects Iraqi Detainees to “Inhuman Treatment”* (July 2003), at <http://www.wsws.org/articles/2003/jul2003/det-j04.shtml> (citing Amnesty International’s claims that for the initial week of detainment many Iraqi detainees were denied access to water and toilet facilities).

¹⁴³ Stephen J. Hedges, *13 Detainees Released, 647 in Limbo at Guantanamo*, CHI. TRIB., May 9, 2003, at A1.

¹⁴⁴ *Id.*

¹⁴⁵ John J. Lumpkin, *Yearly Reviews Planned for Guantanamo Detainees*, CHI. SUN-TIMES, Feb. 14, 2004, at 3.

As stated, since the detainees are not entitled to prisoner of war status, international law does not forbid interrogation so long as it is conducted without torture or ill-treatment. Furthermore, since the vast majority of the detainees are aliens located outside the United States, they are not entitled to Constitutional protections under the Fifth¹⁴⁶ and Fourteenth¹⁴⁷ Amendments. The primary protection against torture or ill-treatment is the Torture Convention which is effectively unenforceable by the international community.

A. Torture Allegations

The United States government's position on the question of torture is that it does not engage in torture or other ill-treatment¹⁴⁸ in questioning or housing detainees. National Security Council spokesman Sean McCormack exemplifies the official stand: "The United States is treating enemy combatants in U.S. government control, wherever held, humanely and in a manner consistent with the principles of the Third Geneva Convention of 1949."¹⁴⁹ This does not mean that the United States does not fully question detainees at a variety of levels. Government officials responsible for gathering information from detainees certainly employ the full range of permissible interrogation tactics.¹⁵⁰ This includes offering various incentives such as money, or engaging in trickery.¹⁵¹

Suggestions by various unnamed government sources that American interrogators might be forced to engage in physical pressure to get information from suspected terrorists surfaced almost immediately after the September 11, 2001 attacks.¹⁵² In October, 2001, a *Washington Post* article

¹⁴⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that extraterritorial application of the Fifth Amendment was not available for aliens).

¹⁴⁷ *Rasul v. Bush*, 215 F. Supp. 2d 55 (2002) (holding Fourteenth Amendment protects resident aliens; however, aliens only receive constitutional protection when they come within territory of the United States and develop substantial connections with this country).

¹⁴⁸ 18 U.S.C. § 2340A (2003) (denouncing the use of torture).

¹⁴⁹ Priest & Gellman, *supra* note 19.

¹⁵⁰ *See id.* ("[I]nterrogators['] . . . methods include feigned friendship, respect, cultural sensitivity, and, in some cases, money.").

¹⁵¹ *Id.*

¹⁵² Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6. This article also relied on retired agents who had no personal knowledge of what was being done in the current environment. *See id.*

served as the information source of choice to those who accused the United States of torture.¹⁵³ The *Washington Post* article quoted an unnamed FBI agent as stating:

We are known for humanitarian treatment, so basically we are stuck
Usually there is some incentive, some angle to play, what you can do for
them. But it could get to that spot where we could go to pressure . . .
where we won't have a choice, and we are probably getting there.¹⁵⁴

In March of 2002, the *Washington Post* once again relied on unnamed sources to alert its readers that the United States government had turned over dozens of suspected terrorists “to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics—including torture and threats to families—that are illegal in the United States”¹⁵⁵ Essentially, the article insinuated that the United States engaged in “rendition.”¹⁵⁶ While an unnamed source in a media article may view a particular country as a nation that satisfies this test, it is ultimately a question for the United States government and the international community to answer.

It is impossible to accurately gauge what interrogation methods a particular State uses without more evidence than that provided by unnamed sources. Additionally, from a legal perspective, there is no international prohibition against rendering a suspected terrorist to a nation that engages in interrogation practices that would constitute ill-treatment.¹⁵⁷ For

¹⁵³ See, e.g., Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2020 (2003) (citing Pincus, *supra* note 152, for the possibility that the United States might engage in applying physical pressure to obtain information).

¹⁵⁴ Pincus, *supra* note 152.

¹⁵⁵ Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1. “After September 11, these sorts of movements have been occurring all the time,” a U.S. diplomat said. “It allows us to get information from terrorists in a way we can’t do on U.S. soil.” *Id.*

¹⁵⁶ See Priest & Gellman, *supra* note 19. As previously noted, rendition is a common practice which is only improper under international law if, for instance, the United States knowingly delivers a suspect to a nation that it has substantial grounds to believe engages in “a consistent pattern of gross, flagrant or mass violations of human rights.” See *Torture Convention*, *supra* note 43, at 197.

¹⁵⁷ See *Torture Convention*, *supra* note 43, at 197. It is a violation of the Torture Convention to extradite an individual to a country that knowingly uses torture however, the Convention provides no similar prohibition on the extradition of

example, assuming that Jordan uses some amount of physical or physiological pressure in its interrogation practices, one must determine whether that type of pressure rises to the level of torture, or only ill-treatment.¹⁵⁸

It was not until December 26, 2002, that the public was alerted to the concept of “stress and duress” tactics allegedly used by American interrogators. According to the initial *Washington Post* story, various unnamed government sources suggested that the United States used a laundry list of questionable techniques to get uncooperative detainees housed outside the United States to talk. The article stated: “Those who refuse to cooperate . . . are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights.” Other examples of stress and duress listed were so-called “false flag” operations in which the detainee is deceived into believing he has been turned over to a “country with a reputation for brutality,” or having female interrogators question the detainee, “a psychologically jarring experience for men reared in a conservative Muslim culture where women are never in control.”¹⁵⁹

The article also alleged that when detainees were first apprehended, “MPs [military police] and U.S. Army Special Forces troops . . . [would] beat them up and confine them in tiny rooms.”¹⁶⁰ To buttress this view, the article then quoted another unnamed American official as saying: “[O]ur guys may kick them around a little bit in the adrenaline of the immediate aftermath [of the arrest].”¹⁶¹

Ultimately, if such stress and duress tactics failed to glean meaningful results, the article reported that the detainees were rendered to other countries where they could be subjected to mistreatment or “mind-altering drugs such as sodium pentathol.”¹⁶² However, the *Washington Post* article placed a caveat on its claims about rendition practices by noting that the CIA’s “Directorate of Operations instructions, drafted in cooperation with

individuals to countries that participate in behavior that only rises to the level of ill-treatment. *Id.*

¹⁵⁸ *Cf.* Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 79 (1978) (noting that to fall within the prohibition of the Torture Convention, the treatment must “attain a minimum level of severity”).

¹⁵⁹ Priest & Gellman, *supra* note 19.

¹⁶⁰ *Id.* (“The alleged terrorists were commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep.”).

¹⁶¹ *Id.*

¹⁶² *Id.*

the general counsel, tells case officers in the field that they may not engage in, provide advice about or encourage the use of torture by cooperating intelligence services from other countries."¹⁶³ Since the publication of the stress and duress story a handful of similar second hand reports found their way into the media, most of them loudly claiming that the United States tortures suspects.¹⁶⁴

B. What Exactly Do American Interrogators Do?

Numerous elements of the government play direct roles in gathering timely intelligence about terrorist networks in the War on Terror. The primary responsibilities are shared by the CIA, the FBI and the Department of Defense ("DOD"). The CIA has primary responsibility for terrorist matters outside the United States¹⁶⁵ and the FBI has primary responsibility for terrorist matters in the United States.¹⁶⁶ The DOD relies chiefly on the Defense Intelligence Agency ("DIA"), a DOD support agency with "over 7000 military and civilian employees" stationed throughout the world.¹⁶⁷

What do American interrogators do once a terrorist suspect is detained? This question is difficult to address because the government refuses to detail its interrogation methods. The standard government response concentrates on emphasizing to the public that the United States complies with the applicable laws and standards without detailing interrogation tactics. For instance, in responding to complaints by Human Rights Watch last year, White House spokesman Scott McClellan responded: "[W]e believe we are in full compliance with domestic and international law, including domestic and international law dealing with torture."¹⁶⁸ Interestingly, Mr. McClellan's statement specifically mentioned torture and not ill-treatment.

¹⁶³ *Id.*

¹⁶⁴ See *supra* note 97 and accompanying text.

¹⁶⁵ See Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981) (defining the purpose of the Central Intelligence Agency as, among other things, conducting counterintelligence activities outside the United States).

¹⁶⁶ See *id.* (assigning intelligence and counterintelligence functions within the United States to the FBI).

¹⁶⁷ See Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency [hereinafter Jacoby Declaration]. This declaration was submitted to the court in *Padilla v. Bush*, 233 F. Supp. 2d 567 (S.D.N.Y. 2002), *cert. granted sub nom.* *Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004).

¹⁶⁸ Cooperman, *supra* note 20.

In tandem with the government's refusal to detail any specifics about its interrogation techniques, open source documents available to the public provide only broad generalizations on interrogation techniques. One of those documents, Army Field Manual 34-52, *Intelligence Interrogation* ("FM 34-52"),¹⁶⁹ clearly prohibits torture or physical stress techniques in conducting interrogation.¹⁷⁰ Thus, gleaning real world details about the mechanics of interrogation requires reliance on domestic and international media sources.

The *Wall Street Journal* attempted to uncover information about current interrogation practices in the War on Terror by publishing a front page story in April 2002.¹⁷¹ The story covered the training given to Army interrogators at the United States Army's interrogation school located in Fort Huachuca, Arizona.¹⁷² The reporter began the piece by making the following observation:

Interrogators—the Pentagon renamed them “human intelligence collectors” last year—are authorized not just to lie, but to prey on a prisoner's ethnic stereotypes, sexual urges and religious prejudices, his fear for his family's safety, or his resentment of his fellows. They'll [Army interrogators] do just about everything short of torture, which officials say is not taught here, to make their prisoners spill information that could save American lives.¹⁷³

The *Wall Street Journal* piece went on to list some of the techniques that are taught at the school to get prisoners to talk.¹⁷⁴ These techniques included the “incentive” approach,¹⁷⁵ the “fear-up” approach,¹⁷⁶ the “fear-

¹⁶⁹ DEPARTMENT OF THE ARMY FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (1992).

¹⁷⁰ *Id.*

¹⁷¹ Jess Bravin, *Interrogation School Tells Army Recruits How Grilling Works: 30 Techniques in 16 Weeks, Just Short of Torture; Do They Yield Much?*, WALL ST. J., Apr. 26, 2002, at A1.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (describing the “incentive” approach as offering a benefit, real or deceptive, to the prisoner in exchange for his cooperation).

¹⁷⁶ *Id.* (describing the “fear-up” approach as “heavy-handed, table-banging violence”); see also Doug Saunders, *War on Terror: U.S. Walks a Fine Line to Make Prisoners Talk, Interrogation Teams Allowed to ‘Fear Up’ Terror Suspects, but Beating Them Is Not OK*, GLOBE & MAIL (Toronto, Canada), Sept. 17, 2002, at A9.

down” approach,¹⁷⁷ the “pride and ego down” approach,¹⁷⁸ and the “pride and ego up” approach.¹⁷⁹ The article goes on to note that stress positions¹⁸⁰—placing prisoners in uncomfortable positions until they talk—are not taught at the school and that a military lawyer is “on hand during interrogations, for quick decisions on the degree of physical or mental pressure allowed.”¹⁸¹

Nevertheless, no matter how accurate media stories might be on the subject, the thoughtful observer must pose the following question: If the government is not engaging in improper interrogation tactics, why won’t it fully reveal its methods? The government’s reluctance to release information about the exact interrogation techniques used on detainees is obviously rooted in the need for operational security. If al-Qáeda (or another enemy group) knows in detail how American interrogation practices operate, they can develop counter-intelligence techniques to frustrate that process.¹⁸² One official source available to the public on the issue of the need for secrecy in the use of interrogations in the War on Terror is the Jacoby Declaration.¹⁸³ The Jacoby Declaration is a nine-page sworn statement

¹⁷⁷ See Bravin, *supra* note 171. The “fear-down” approach “targets terrified prisoners. Interrogators try to calm them, asking about personal or family life, eventually interjecting the questions they really want answered. The technique ‘may backfire if allowed to go too far,’ the manual cautions, raising a prisoner’s self-confidence to the point where he won’t feel he has to answer.” *Id.*

¹⁷⁸ *Id.* The “pride and ego down,” approach is where interrogators “belittle a prisoner’s ‘loyalty, intelligence, abilities, leadership qualities, sloppy appearance or any other perceived weakness.’” This technique is viewed as the “last ditch” effort. *Id.*

¹⁷⁹ *Id.* The “pride and ego up” approach is described as “mak[ing] them feel good [and] that you’re their best friend.” In this technique, “a prisoner thought to have been ‘looked down upon for a long time’ is flattered and made to feel that by providing information, he can ‘show someone that he does indeed have some brains.’” *Id.*

¹⁸⁰ *Id.* The article quotes an instructor as telling his students that “placing prisoners into . . . ‘stress positions’ until they talk” is not taught at the school. *Id.*

¹⁸¹ *Id.*

¹⁸² See Bowden, *supra* note 108, at 56. “Everybody in the world knows that if you are arrested by the United States, nothing bad will happen to you.” *Id.* (quoting a former CIA agent).

¹⁸³ Jacoby Declaration, *supra* note 167; see also Serrano & Miller, *supra* note 99. The Jacoby Declaration disclosed more than one hundred foiled attacks against the United States. Prosecutors have used the Jacoby Declaration to highlight interrogations’ importance and to stress that if a suspected terrorist is able to meet

issued to the District Court for the Southern District of New York in *Padilla v. Bush*, by Vice Admiral Lowell E. Jacoby (USN), the Director of the DIA.

In a section entitled, *Interrogation Techniques*, Jacoby states that the “approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator.”¹⁸⁴ Creating this atmosphere can take a prolonged period of time.¹⁸⁵ Then, in a section entitled, *Use of Interrogations in the War on Terrorism*,¹⁸⁶ Jacoby devotes several paragraphs to describing asymmetric warfare and the unique threats posed by terrorists who “have . . . clearly demonstrated their willingness—and in fact have expressed their intent—to use any type of potential weapon, including weapons of mass destruction”¹⁸⁷ against the United States. Jacoby, however, refuses to provide any information regarding American interrogators’ methods. Jacoby states only that the “United States is now engaged in a *robust*”¹⁸⁸ program of interrogating individuals who have been identified as enemy combatants in the War on Terrorism.¹⁸⁹ Then, in a last amplification he states: “As detainees collectively increase their knowledge about United States detention facilities and *methods of interrogation*, the potential risk to national security increases *should those methods be released*.”¹⁹⁰ As of this writing, as many as ten people who worked as translators or counselors for the detainees at Guantanamo Bay have been investigated for possible espionage.¹⁹¹

The initial goal of interrogation is to get the suspect to start talking. The best way to get reliable and useful information is to treat the sub-

with his lawyer it would seriously “disrupt government efforts for his cooperation,” risk the “loss of a critical intelligence resource,” and “result in a grave and direct threat to national security.” *Id.*

¹⁸⁴ Jacoby Declaration, *supra* note 167, at 4.

¹⁸⁵ *Id.* (“Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time.”).

¹⁸⁶ *Id.* at 5–6.

¹⁸⁷ *Id.* at 5.

¹⁸⁸ *Id.* at 6 (emphasis added). In the last paragraph of this section Jacoby again uses the term robust: The necessary intelligence “cannot be obtained without robust interrogation efforts.” *Id.*

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ *Id.* (emphasis added).

¹⁹¹ Eric Schmitt & Thom Shanker, *Fear of Sabotage by Mistranslation at Guantanamo*, N.Y. TIMES, Oct. 7, 2003, at A1.

ject humanely,¹⁹² and not engage in torture or ill-treatment. When faced with torture individuals will say anything to stop the pain, thus making their statements nearly worthless. According to a former Colonel in Army intelligence: "Anything you can do to disconnect someone is going to help . . . [b]ut it's a myth that torture is effective. The best way to win someone over is to treat them kindly."¹⁹³ From a practical perspective this is certainly a fundamental reason that torture should not be employed—it seldom produces truthful statements, particularly in the case of hardened zealots willing to engage in suicide missions. If they are willing to kill and be killed for their cause, they are likely prepared to withstand torture.

The story of "Half-Dead Bob" typifies the al-Qáeda mind set while illustrating the American policy of humane treatment of detainees in accordance with the principles of the Third Geneva Convention.¹⁹⁴ An Arab captured on the battlefield of Afghanistan was nicknamed Half-Dead Bob by the Americans when he arrived at Guantanamo Bay.¹⁹⁵ His nickname derived from the fact that he came to the detention center weighing sixty-six pounds, suffering from tuberculosis, shrapnel wounds, and having only one lung.¹⁹⁶ The article states:

Army Maj. Gen. [Major General] Michael Dunlavey vividly remembers his first encounter with 'Bob.' Dunlavey ran interrogations at the base until November of last year. By the time they met, Bob was making a rapid recovery. He had put on 50 pounds and, sitting across a table from Dunlavey, he thanked him for the food and medical treatment. 'General, you are probably a good Christian,' Dunlavey recalls him saying. 'And you are probably a good man. But if I ever get free, I will kill you.'¹⁹⁷

¹⁹² See Juan O. Tamayo, *U.S. Interrogation of Prisoners 'Smooth Process,' Military Says*, MIAMI HERALD, Feb. 13, 2002, at A6. The commander of one unit at Camp X-Ray says, "We treat them in a firm, fair and humane way and they don't give us any hassles at all." Camp officials report that a "significant number" of prisoners are cooperating with their interrogators. *Id.*

¹⁹³ Julian Borger, *Metallica is Latest Interrogation Tactic*, GUARDIAN (London), May 20, 2003, at 11.

¹⁹⁴ See David E. Kaplan et al., *Playing Offense: After 9/11, the Gloves Come Off*, U.S. NEWS & WORLD REP., June 2, 2003, 2003 WL 2021707.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

C. *What Can United States Interrogators Do?*

Saddam Hussein's December 13, 2003 capture once again brought the issue of acceptable interrogation techniques into the public eye.¹⁹⁸ Before Saddam was designated by the United States as a prisoner of war, what could American authorities do to make Saddam reveal critical information?

Domestic law clearly prohibits torture.¹⁹⁹ The prohibition on torture under international law is equally clear and many of the practices that constitute torture are universally accepted as illegal. The waters become increasingly opaque as one ventures into the realm of ill-treatment and beyond into techniques that, while questionable, may or may not constitute ill-treatment, e.g., stress and duress. Additionally, the legal parameters associated with interrogation techniques depend in part on where the interrogation takes place. Interrogations conducted by law enforcement within the United States must not violate constitutional protections, while interrogations conducted outside the United States, including those conducted by foreign agents resulting from rendition, provide little hope to the detainee for judicial review in an American forum.²⁰⁰

The Supreme Court's *Chavez v. Martinez*²⁰¹ decision provides some guidance as to what techniques would be lawful for interrogators to use in the United States. The central issue in *Chavez* involved coercive questioning by a police officer.²⁰²

While "investigating suspected narcotics activity"²⁰³ near a vacant lot, police in Oxnard, California, stopped Oliverio Martinez as he was riding his bike down a darkened path.²⁰⁴ The police conducted a patdown frisk of Martinez and discovered a knife in his waistband. An altercation ensued and police officers claim that Martinez took one of their guns and pointed it at them.²⁰⁵ Officer Peña then drew her service pistol and shot Martinez several times,²⁰⁶ leaving him blinded and paralyzed.²⁰⁷ Martinez was placed

¹⁹⁸ See James Risen & Thom Shanker, *Hussein Enters Post-9/11 Web of U.S. Prisons*, N.Y. TIMES, Dec. 18, 2003, at A1.

¹⁹⁹ See *supra* notes 93–96 and accompanying text.

²⁰⁰ But see Alien Tort Claims Act, 28 U.S.C. § 1350 (2003) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

²⁰¹ *Chavez v. Martinez*, 123 S. Ct. 1994 (2003).

²⁰² See *id.* at 1999.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

under arrest and taken by ambulance to the hospital.²⁰⁸ Sergeant Ben Chavez, the patrol supervisor, “accompanied Martinez to the hospital and then questioned Martinez there while he was receiving treatment from medical personnel.”²⁰⁹ The interrogation in the emergency room of the hospital “lasted a total of about 10 minutes, over a 45-minute period, with Chavez leaving the emergency room for periods of time to permit medical personnel to attend to Martinez.”²¹⁰

Chavez never read Martinez his *Miranda* warnings during the interrogation.²¹¹ There can be no question that Martinez was disoriented and in extreme pain throughout the process of interrogation.²¹² Martinez was at first uncooperative.²¹³ “At one point, Martinez said ‘I am not telling you anything until they treat me,’ yet Chavez continued the interview.”²¹⁴ Martinez later admitted to taking the gun and pointing it at police.²¹⁵ It was this act that resulted in Peñ shooting Martinez.

Although Martinez was never charged with any crime and his statements were never used against him in a criminal proceeding, he subsequently filed a claim for damages in the United States District Court for the Central District of California under 42 U.S.C. § 1983,²¹⁶ alleging that Sergeant Chavez had violated his Fifth Amendment right against self-incrimination and his Fourteenth Amendment substantive due process

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 1999–2000.

²¹² *Id.* at 1999. Martinez was shot several times, causing severe injuries that left Martinez permanently blinded and paralyzed from the waist down. *Id.*

²¹³ *Id.* His initial answers were “‘I don’t know,’ ‘I am dying,’ and ‘I am choking.’” *Id.*

²¹⁴ *Id.* Medical personnel were treating Martinez. *Id.*

²¹⁵ *Id.* Chavez also admitted to using heroin regularly. *Id.*

²¹⁶ 42 U.S.C. § 1983 (2003).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id.

rights.²¹⁷ The Ninth Circuit Court of Appeals affirmed the district court's denial of Chavez's defense of qualified immunity and entered summary judgment in favor of Martinez for both claims.²¹⁸ The Supreme Court granted certiorari,²¹⁹ then reversed and remanded the case.²²⁰

In seeking guidance for questioning suspected terrorists within the United States, *Chavez* is significant for two reasons. First, by overturning the Ninth Circuit's ruling that "the mere use of compulsive questioning, without more, violates the Constitution,"²²¹ the Court clearly established that the Fifth Amendment is not violated when law enforcement agents who do not intend to use statements in subsequent criminal proceedings coercively interrogate an unwilling suspect without providing *Miranda*²²² warnings.²²³ The Court held that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness."²²⁴ Thus, the Court held that "the absence of a 'criminal case' in which Martinez was compelled to be a 'witness' against himself defeats his core Fifth Amendment claim"²²⁵ and voids any § 1983 action.²²⁶ The Court quickly noted that it did not condone torture or ill-treatment by law enforcement:

Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used in trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.²²⁷

Second, the ruling left in place the subjective "shock the conscience"²²⁸ standard, taken from *Rochin v. California*,²²⁹ for determining when the

²¹⁷ *Chavez*, 123 S. Ct. at 2000.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 2006.

²²¹ *Id.* at 2001.

²²² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

²²³ *Chavez*, 123 S. Ct. at 2004 (citing *Connecticut v. Barrett*, 479 U.S. 523 (1987)).

²²⁴ *Id.* at 2002.

²²⁵ *Id.* at 2004.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 2005.

²²⁹ *Rochin v. California*, 342 U.S. 165 (1952).

police cross the threshold for conduct that violates the Fourteenth Amendment. In *Rochin*, police officers witnessed the defendant swallow two capsules which they suspected were illegal substances.²³⁰ Officers handcuffed Rochin and took him to a hospital where a doctor forced an emetic solution through a tube into his stomach and against his will.²³¹ Rochin vomited two morphine capsules and was subsequently convicted.²³² The Supreme Court overturned the conviction and held that obtaining evidence by methods that are “so brutal and so offensive to human dignity” violate the Fourteenth Amendment’s Due Process Clause.²³³

[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting [sic] crime too energetically. This is conduct that shocks the conscience. . . . They are methods too close to the rack and screw to permit of constitutional differentiation.²³⁴

The *Chavez* Court remanded the issue of whether the facts violated the Fourteenth Amendment, though at least five of the justices apparently were not “shocked”²³⁵ that Sergeant Chavez engaged in a repetitive interrogation even though Martinez was suffering severe pain.²³⁶ Although Sergeant Chavez may have benefitted from the situation if Martinez subjectively thought that he had to answer questions in order to get medical treatment, this was not the case, since medical personnel were treating Martinez throughout the interrogation period.²³⁷ Justice Thomas wrote that “we cannot agree with Martinez’s characterization of Chavez’s behavior as ‘egregious’ or ‘conscience shocking.’”²³⁸ The fact that Chavez did not interfere with medical treatment and did not cause Martinez’s pain (wounds occurred prior to and totally apart from the questioning process) were certainly important factors influencing some, but not all, of the justices.²³⁹

Justice Stevens, however, saw Sergeant Chavez’s interrogation as tantamount to torture and a clear violation of the Fourteenth Amendment:

²³⁰ *Id.* at 166.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 174.

²³⁴ *Id.* at 172 (emphasis added).

²³⁵ *Chavez v. Martinez*, 123 S. Ct. 1994, 2005–06 (2003).

²³⁶ *Id.* at 2006.

²³⁷ *Id.* at 2005.

²³⁸ *Id.*

²³⁹ *Id.* at 2005, 2010–11.

As a matter of fact, the interrogation of respondent was the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods. As a matter of law that type of brutal police conduct constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty.²⁴⁰

Unfortunately, the Court did not provide any new approaches to assist in defining what constitutes behavior that “shocks the conscience.” The Court was content to cite previous examples from past cases,²⁴¹ traced from its decision in *Brown v. Mississippi*.²⁴²

The *Brown* Court ruled that convictions based on confessions extracted by law enforcement through methods tantamount to torture violated the Fourteenth Amendment.²⁴³ The local police in *Brown* hanged and whipped a murder suspect until he confessed.²⁴⁴ Other defendants “were made to strip and . . . were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it . . . and in this manner the defendants confessed to the crime.”²⁴⁵ All of the defendants were convicted of murder and sentenced to death.²⁴⁶ The Supreme Court reversed the convictions, stating:

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’ . . . [T]he freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.²⁴⁷

Not all fact patterns are as easy to associate with torture as *Brown*, which clearly displays torture at its worst. Those familiar with the “shock the conscience” test understand that the Court has often interpreted the test

²⁴⁰ *Id.* at 2010 (Stevens, J., concurring in part, dissenting in part).

²⁴¹ *Id.* at 2005–09.

²⁴² *Brown v. Mississippi*, 297 U.S. 278 (1936).

²⁴³ *Id.* at 286–87.

²⁴⁴ *Id.* at 285–86.

²⁴⁵ *Id.* at 282.

²⁴⁶ *Id.* at 279.

²⁴⁷ *Id.* at 285–86 (citations omitted).

with a great degree of flexibility, particularly when judging the actions of law enforcement officers faced with exigent circumstances related to issues such as public safety. In *County of Sacramento v. Lewis*,²⁴⁸ the Court denied a § 1983 claim based on an alleged substantive due process violation.²⁴⁹ In *Lewis*, a motorcycle passenger died at the end of a high-speed police chase when the motorcycle tipped over and the police car, in close pursuit, struck and killed the respondent's sixteen-year-old son.²⁵⁰

In discussing the threshold for "shocking the conscience," the *Lewis* decision "made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."²⁵¹ Indeed, "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."²⁵²

An equally important aspect of *Lewis* centered in the Court's view that it must be "intended to injure in some way . . . by any government interest is the sort of official action most likely to rise to the conscience-shocking level."²⁵³ This means that the Court will provide greater deference if the government can demonstrate a justification for its conduct based on the totality of the circumstances.²⁵⁴ The stronger the justification, the more flexibility allowed.²⁵⁵

²⁴⁸ *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

²⁴⁹ *Id.* at 854–55.

²⁵⁰ *Id.* at 836–37.

²⁵¹ *Id.* at 848.

²⁵² *Id.* at 847.

²⁵³ *Id.* at 849.

²⁵⁴ *Id.* at 852–53.

We accordingly [have] held that a much higher standard of fault than deliberate indifference has to be shown for officer liability in a prison riot

....

....

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance."

Id. (citations omitted).

²⁵⁵ See *Breithaupt v. Abram*, 352 U.S. 432 (1957) (holding that withdrawing blood from an unconscious drunk driving suspect did not rise to the level of

This deference factor certainly played out in the Ninth Circuit in *Blefare v. United States*.²⁵⁶ In a fact pattern similar to *Rochin*, the appellants were suspected of swallowing narcotics which were believed to be lodged in their rectums or stomachs.²⁵⁷ U.S. officials searched appellants at a border crossing from Mexico into the United States²⁵⁸ after they consented to a rectal probe by a doctor.²⁵⁹ When the rectal probe found no drugs, a “[s]aline solution was . . . given [to] the appellants to drink to produce vomiting.”²⁶⁰ Blefare, one of the suspects, “was seen by the doctor to have regurgitated an object and reswallowed it.”²⁶¹ Then, the doctor, without Blefare’s consent, forcefully passed a soft tube into his “nose, down [his] throat and into [his] stomach,”²⁶² to pass fluid which induced vomiting. This resulted in the discovery of packets of heroin and the subsequent conviction of Blefare.²⁶³

The Ninth Circuit refused to hold that the involuntary intrusion into Blefare’s stomach shocked the conscience.²⁶⁴ The court attempted to distinguish *Blefare* from *Rochin* by noting that the officers in *Rochin* illegally invaded the home and later forced an emetic into his stomach, whereas the event in *Blefare* took place at a border crossing and the actions to induce vomiting were *not* brutal.²⁶⁵ The ruling arguably hinged on the fact that the State had an important governmental interest in keeping heroin from entering the United States. In the court’s view it would have been shocking had they set aside the conviction based on the due process clause.²⁶⁶ The court explained:

It would shock the conscience of law abiding citizens if the officers, with the knowledge these officers had, were frustrated in the recovery and use of this evidence. It is shocking to know that these appellants

“shocking the conscience”).

²⁵⁶ *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966).

²⁵⁷ *Id.* at 872.

²⁵⁸ *Id.* at 871.

²⁵⁹ *Id.* at 872.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 871.

²⁶⁴ *Id.* at 875.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 876.

swallowed narcotics to smuggle it into and through the United States for sale for profit

“If we were mechanically to invoke *Massiah* (Rochin) to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individuals into meaningless mechanism for the obstruction of justice.”²⁶⁷

Proponents of coercive questioning techniques have several cases to cite, that buttress the view that in exigent circumstances police may be obliged to use force to obtain life-saving information.²⁶⁸ In *Leon v. Wainwright*,²⁶⁹ for example the Eleventh Circuit brushed aside the fact that police officers had used “force and threats”²⁷⁰ on kidnap suspect Jean Leon in order to get him to reveal the location of his victim.²⁷¹ When apprehended by a group of police officers in a Florida parking lot, Leon refused to reveal the location of his kidnap victim (the victim, Louis Gachelin, had been taken by gunpoint to an apartment where he was undressed and bound).²⁷² To get Leon to talk, police officers then “physically abused him by twisting his arm behind his back and choking him until he revealed where . . . [the kidnap victim] was being held.”²⁷³ Leon was later taken to the police station where he made a second confession which the court ruled as admissible at his trial.²⁷⁴ The court deemed that the actions of the officers were reasonable given the immediate concern to find the victim and save his life.²⁷⁵

We do not by our decision sanction the use of force and coercion by police officers. Yet this case does not represent the typical case of unjustified force. We did not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. This was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death.²⁷⁶

²⁶⁷ *Id.* (quoting *United States v. Guerra*, 334 F.2d 138, 147 (2d Cir. 1964)).

²⁶⁸ *See, e.g., Leon v. Wainwright*, 734 F.2d 770, 773 (1984).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 771.

²⁷³ *Id.*

²⁷⁴ *Id.* at 773.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

Returning to *Chavez*,²⁷⁷ the government briefly attempted to draw together the concept of governmental interest by arguing that the *Chavez* Court should take the opportunity to create a “terrorist exception,”²⁷⁸ which would accord protection to police officers from § 1983 suits, when questioning suspected terrorists. The justices did not directly address this matter. Nevertheless, if one adds *Chavez* to *Lewis*²⁷⁹ and its progeny, certain constitutional parameters for interrogating a terrorist suspect can now be staked out. Simply put, even if a suspect asks for a lawyer and demands that all questioning cease, law enforcement may justifiably refuse these requests and engage in interrogation that may consist of coercive techniques so long as the techniques utilized fall below the threshold of shocking the conscience (which equates to actions not in violation of the Torture Convention). Additionally, under the concept of governmental interest, more deference is given to police interrogators the more the suspected terrorist matches the profile of the ticking time bomb terrorist.²⁸⁰

Critics of *Chavez*, such as Brooklyn law professor Susan Herman, rightly understand that allowing coercive interrogation techniques short of the ambiguous shock the conscience standard, leaves open the door to abuse of those not suspected of terrorism.²⁸¹ Others, such as Thomas Jefferson Law School’s Marjorie Cohn, are dismayed that the *Chavez* Court refused to acknowledge the existence of the Torture Convention and its place in the matter of coercive interrogations.²⁸²

Even when conducting interrogations outside the borders of the United States, agents have no greater flexibility as to the interrogation tactics they may lawfully employ.²⁸³ The applicable rules regulating the allowable degree of persuasion are drawn from the Torture Convention which outlaws torture and ill-treatment.²⁸⁴ Overseas interrogations are more likely to push the envelope since the detainee is usually located in an environment, such

²⁷⁷ *Chavez v. Martinez*, 123 S. Ct. 1994 (2003).

²⁷⁸ See Brief for Petitioner at 14 n.4, *Chavez* (No. 01-1444).

²⁷⁹ *Chavez*, 123 S. Ct. at 1994; *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (holding that the phrase “shock to conscience” is not a rigid standard and depends largely on circumstances of the case).

²⁸⁰ See *infra* Part IV.

²⁸¹ David G. Savage, *Terrorism War Arrives at High Court*, A.B.A. J., Dec. 2002, at 28.

²⁸² Marjorie Cohn, *Dropping the Ball on Torture: The U.S. Supreme Court Ruling in Chavez v. Martinez*, JURIST, June 10, 2003, <http://jurist.law.pitt.edu/forum/forumnew113.php>.

²⁸³ 18 U.S.C. § 2340A (2003).

²⁸⁴ See *supra* notes 54–78 and accompanying text.

as Guantanamo Bay, where he has no access to any forum for judicial review. For instance, in May 2003 reports emerged that American interrogators were using “unorthodox musical techniques to extract information . . . from their detainees [held outside the United States].”²⁸⁵ Combining children’s song and heavy metal rock music, interrogators were allegedly subjecting detainees to the various sounds in order to break their will.²⁸⁶ Depending on the intensity and duration of the music, this tactic could encompass the full range of legality—it could be a legitimate means to disconnect a detainee from his environment if used for short periods of time at reasonable decibels. Conversely, it could be considered a form of torture if employed for a prolonged period of time and at an unreasonable volume.

If one relies on the *Ireland*²⁸⁷ case as the baseline for establishing ill-treatment, it is important to note that the *Ireland* Court found that the “five techniques” used by the British government against Irish Republican Army members caused intense physical pain and mental suffering²⁸⁸ but not of the intensity and cruelty implied by torture—not severe pain.²⁸⁹ The *Ireland* Court found that the five techniques were calculated to cause feelings of fear and break the physical and moral remittances of the subject detainee.²⁹⁰ In turn, the United States may be able to render a suspect to a country that engages in ill-treatment, but it may not engage in ill-treatment itself.

Another source of guidance to distinguish a reasonable interrogation from an interrogation that crosses the line into ill-treatment or torture is the Israeli High Court’s decision in *Public Committee Against Torture v. State of Israel*.²⁹¹ In the context of outlawing certain interrogation practices by Israeli officials, the High Court considered how otherwise reasonable

²⁸⁵ See JULIAN BORGER, *Metallica is Latest Interrogation Tactic*, GUARDIAN, May 20, 2003, at P11.

²⁸⁶ *Id.*

²⁸⁷ *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. (1978).

²⁸⁸ *Id.* at 79–80.

²⁸⁹ *Id.* at 80.

²⁹⁰ *Id.*

²⁹¹ *Public Comm. Against Torture v. State of Israel*, 38 I.L.M. 1471 (1999) (consolidating the complaints of seven plaintiffs who alleged that the techniques employed by the Israeli General Security Services were illegal). For an excellent overview of the case, see Melissa L. Clark, Note, *Israel’s High Court of Justice Ruling on the General Security Service Use of “Moderate Physical Pressure”: An End of the Sanctioned Use of Torture?*, 11 IND. INT’L & COMP. L. REV. 145, 164–67 (2000).

interrogation practices could become illegal if taken to an extreme point of intensity.²⁹² Playing music to disorient a subject prior to questioning is not illegal per se, but if the music is played in a manner that causes undue suffering, it is arguably a form of ill-treatment or torture.²⁹³ Depriving subjects of sleep during a lengthy interrogation process may be legitimate, but depending on the extent of sleep deprivation could also constitute ill-treatment or torture.²⁹⁴ The use of handcuffing for the protection of the interrogators is a common and acceptable practice provided the handcuffs are not tightened so as to cause excess pain.²⁹⁵ Similarly, the use of blindfolds is acceptable if done for legitimate security reasons, while the use of sacks over the head without proper ventilation is unacceptable.²⁹⁶

Speaking strictly from a legal perspective, the United States cannot engage in torture without violating the Torture Convention and domestic law.²⁹⁷ Still, the United States may legitimately engage in interrogation practices that do not rise to the level of ill-treatment. This is, however, an ambiguous zone subject to interpretation based on the facts and in many cases unknowable without judicial guidance.²⁹⁸

If an agent of the United States engages in *torture* while interrogating, for example, al-Qáeda suspects, the government is obligated under both domestic and international law to investigate and prosecute those responsible. But if the United States engages in *ill-treatment* of al-Qáeda detainees it is not obligated under international law to either prosecute the torturer or to turn that person over to any other nation or entity for prosecution.²⁹⁹ Thus, if the much reported American “stress and duress” tactics do constitute ill-treatment, the United States has violated international law but is under no strict obligation under international law to take punitive action against the offenders.³⁰⁰ Fortunately, the United States has exhibited a willingness to fulfill its obligations and has conducted prosecutorial investigations of its agents who allegedly have engaged in the ill-treatment of detainees.³⁰¹

²⁹² See *Public Comm. Against Torture*, 38 I.L.M. at 1480–84.

²⁹³ *Id.* at 1484.

²⁹⁴ *Id.* at 1482.

²⁹⁵ *Id.* at 1483.

²⁹⁶ *Id.*

²⁹⁷ See *supra* Part II.

²⁹⁸ See *supra* Part II.

²⁹⁹ See *supra* notes 71–78 and accompanying text.

³⁰⁰ See *supra* notes 71–78 and accompanying text.

³⁰¹ See *infra* notes 317–20 and accompanying text.

D. Weighing the Allegations

Determining the credibility of charges that the United States engages in torture or ill-treatment as a standard practice is at best difficult. While suggestions of torture generally come from media reports based on unnamed sources and anecdotal evidence,³⁰² the government's penchant for secrecy regarding interrogation tactics makes an independent assessment nearly impossible.

Many of the mainstream media reports that suggest the occurrence of torture or ill-treatment might be occurring as a command directed practice also send mixed signals by simultaneously cautioning that "no direct evidence of [sanctioned] mistreatment of prisoners in U.S. custody has come to light"³⁰³ To date, the mistreatment of Iraqi detainees at Abu Ghraib prison appears to have been the result of soldiers operating in their individual capacity.³⁰⁴ Then, in follow up articles to an initial story alleging untoward conduct by American officials, one is usually greeted with a White House spokesman who assures the public that the United States is "in full compliance with international law dealing with torture,"³⁰⁵ and that wherever detainees are being held they are all treated "'humanely, in a manner consistent with the third Geneva Convention.'" ³⁰⁶

Cognizant of the dilemma of separating fact from speculation in this type of information environment, some international law experts have provided alternative interpretations to, for instance, the purported use of "stress and duress" interrogation tactics. Yale law professor Ruth Wedgwood opined that, based on the limited information available to the public on this matter, it was debatable whether the American interrogation techniques as reported in the *Washington Post* constituted torture.³⁰⁷ Wedgwood cautioned that she was "somewhat skeptical" of the reports from unidentified sources, wondering how much was "swagger" and "tough

³⁰² See, e.g., *supra* note 99 and accompanying text; *infra* notes 333–34 and accompanying text.

³⁰³ Priest & Gellman, *supra* note 19, at A1.

³⁰⁴ Executive Summary of Article 15–6, Investigation of the 800th Military Police Brigade by Maj. Gen. Antonio M. Taguba, <http://www.msnbc.msn.com/id/4894001>.

³⁰⁵ Cooperman, *supra* note 20, at A9. "Wherever U.S. forces are holding combatants, they are being held 'humanely, in a manner consistent with the third Geneva Convention'" *Id.* (citations omitted).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

talk” as opposed to actual conduct.³⁰⁸ Furthermore, she correctly pointed out that reports that detainees are held in “awkward, painful positions” is an ambiguous concept which does not speak to degree or circumstance.³⁰⁹ Wedgwood noted: “If it’s [stress and duress] hanging someone from their wrists, absolutely not—that’s prohibited But if it’s keeping someone in handcuffs or temporarily hooded during transport, maybe yes—as a legal matter, there could be legitimate reasons for that.”³¹⁰

Though “stress and duress” sounds foreboding, there are many techniques involving acts which are clearly permissible under any analysis. For example, one would be hard pressed to argue that the reported use of female interrogators, trickery, or a day long interrogation session would constitute a *prima facie* case of torture or even ill-treatment, as some have suggested. Further, one cannot simply conclude that the use of awkward positioning of a particular detainee violates legal norms. Without more information, the term “awkward positioning” is simply too subjective to evaluate.

Similarly, reports that United States Army Special Forces troops (Green Berets) engage in illegal physical abuse of detainees as the *modus operandi* of their rules of engagement are particularly suspect.³¹¹ The Army’s Special Forces are elite and highly trained professionals in every respect, with a long history of conducting unconventional³¹² and direct action³¹³ missions in strict accordance with the rule of law.³¹⁴ Many Special Forces troops have been specially trained in close-quarter fighting and have seen first-hand such combat.³¹⁵ Although they know that the enemy violates all codes of civilized behavior, violating basic human rights is absolutely incompatible with their creed of professionalism. Recognizing early on that Green Berets represent the vanguard of unconventional warfare, (then) Commander of all Army Special Forces, Major General Kenneth Bowra,

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ See Steve Fainaru, *9/11 Detainees Abuse: Justice Dept. Review Outlines Immigrant Rights Violations*, WASH. POST, June 3, 2003, at A1.

³¹² See Jeffrey Addicott, *The Role of Special Operations Forces and the War on Terrorism*, in *THE GLOBAL WAR ON TERRORISM: ASSESSING THE AMERICAN RESPONSE* (John Davis ed.) (forthcoming 2004).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ See, e.g., Gregg Zoroya, *Inches Divide Life, Death in the Afghan Darkness*, USA TODAY, Oct. 20, 2003, at A1 (detailing one Special Forces soldier’s experience in Afghanistan).

in 1995, issued a punitive directive regarding the reporting of human rights violations committed by any Special Forces soldier.³¹⁶ These elite soldiers are held to higher standards of conduct.³¹⁷

A factor lending tremendous credibility to the government's contention that it abides by the international law prohibiting torture is the military's continuing commitment to criminally investigate and prosecute those soldiers accused of torture or ill-treatment.³¹⁸ Several criminal investigations are currently underway,³¹⁹ including the current criminal investigation "into the handling of two prisoners who died in U.S. custody at the Bagram base [in Afghanistan]."³²⁰ If the government is sincere about prohibiting torture and ill-treatment, one would certainly expect that those engaging in such illegal acts would be investigated and punished to the full extent of the law. The fact that military officials initiated the first story of the investigation at Bagram Air Base further boosts the sincerity of the United States to reject the practice of illegal interrogations.³²¹

³¹⁶ See Jeffrey F. Addicott, *Special Forces and the Promotion of Human Rights*, SPECIAL WARFARE, Dec. 1996, at 35–36.

³¹⁷ *Id.* The memorandum requires any Special Forces soldier who deploys outside the United States to:

- (1) Receive training in the full range of human-rights issues, both generally and as they apply to the host nation to which the soldiers are deploying.
- (2) Report through the chain of command all gross violations of human rights encountered [outside the continental United States].

Id.

³¹⁸ See *Dayside* (FOX News Channel television broadcast, Oct. 31, 2003) (discussing with *Dayside's* Linda Vestor the legal aspects of pending charges against Lieutenant Colonel charged with assault in the interrogation of an Iraqi detainee). The audience was largely opposed to the military's criminal investigation of the officer. *Id.*; see also Rowan Scarborough, *Colonel in Iraq Refuses to Resign; Prosecutors Offer Rejected*, WASH. TIMES, Oct. 31, 2003, at A1.

³¹⁹ See Greg Risling, *8 Charged in Abuse of POWs*, FORT-WORTH STAR TELEGRAM, Oct. 19, 2003, at 21; Matt Kelley, *U.S. Charges 4 MPs With Abusing POWs*, SAN DIEGO UNION-TRIB., July 27, 2003, at A2; Marc Kaufman, *Army Probing Deaths of 2 Afghan Prisoners*, WASH. POST, Mar. 5, 2003, at A13. Initial autopsies suggested that one of the detainees died of a pulmonary embolism and the other of a heart attack. Later reports listed the deaths as homicides. *Id.*; see also Jonathan Turley, *Allegations of Torture Hurt American Cause*, NEWSDAY, Mar. 7, 2003, at A38 (discussing alleged torture).

³²⁰ See Priest & Gellman, *supra* note 19.

³²¹ *Id.*

Of course, the most direct source of information on torture allegations comes from those detainees who claim to have been tortured by the Americans.³²² Consequently, as small groups of detainees are released from custody, Western reporters have attempted to glean first hand testimony of torture allegations.³²³ As one would expect, many of these newly-released members of the Taliban and al-Qáeda allege that they were horribly tortured by their American captors.³²⁴ Unexpectedly, however, others in these same groups are quite open in proclaiming that all the detainees were well-treated and not tortured.³²⁵ For instance, in a group of twenty-seven detainees released from Guantanamo Bay in July 2003, sixteen Afghans were interviewed by Associated Press correspondents as they were transferred to a Red Cross bus in Afghanistan. Those who alleged they were tortured complained in general terms of “cold rooms,” “crowded rooms,” and “beatings.”³²⁶ Only one in the group, Abdul Rehman, specifically alleged that he had been “badly punished 107 times,” and had been chained and beaten with “a metal rod on his legs and back.”³²⁷ Interestingly, when pressed by reporters to show any scars or evidence left by the torture, Rehman “refused to show scars that may have resulted from any abuse.”³²⁸

In contrast, another detainee, Nate Gul, told reporters that none of the detainees were beaten during interrogation: “They didn’t beat us during the interrogation. . . . They wrote down anything we said. They interrogated me about 30 to 40 times.”³²⁹ One terrorist expert revealed the following comments:

[T]wo former Pakistan inmates [in Guantanamo]—Shah Muhammad and Sahibzada Osman Ali—told me that except for some roughing up

³²² See Neil A. Lewis, *Lawyer for Taliban Detainee Says His Client is Depressed*, N.Y. TIMES, Dec. 18, 2003, at 25A. Few lawyers have been permitted to see the detainees. Australian attorney Stephen Kenny represents David Hicks, an Australian who joined the Taliban in 1999 and was captured by coalition forces in Afghanistan. Kenny reported that his client was depressed but did not allege that he had been tortured or abused. *Id.*

³²³ Amir Shah, *Freed Afghans Tell of Jail Stay; The 16 Had Been Held at Guantanamo Bay. They Disagreed on How They Were Treated There*, PHILA. INQUIRER, July 20, 2003, at A13.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

immediately after they were captured, they were not badly treated at Camp X-Ray. They both felt bored, lonely, frustrated, angry, and helpless (enough for Shah Muhammad to attempt suicide), but neither believed that he would be harmed by his American captors, and both regarded the extreme precautions (shackles, handcuffs, hoods) that so outraged the rest of the world as comical.³³⁰

In another case, a freed Afghan who spent fourteen months at Guantanamo recalled that the Americans taught him to read and “were good people.”³³¹ In June 2003, Attorney General John Ashcroft addressed the House Judiciary Committee and responded to critics who alleged “‘significant problems’ in how law enforcement officials treated some of the 762 people detained. . . .”³³² An internal inspector general’s report found evidence of “alleged beatings and other abuse at a high-security facility prison [Metropolitan Detention Center] in Brooklyn, N.Y., where 84 of the people were detained.”³³³ The Attorney General testified that investigations into the allegations were ongoing, but in no way condoned by law enforcement.³³⁴

Overall, allegations that the United States condones and uses torture and ill-treatment as interrogation tools are vastly overstated and often simply taken for granted by scholars who should know better. For instance, in his latest book, *The Case for Israel*, Professor Alan Dershowitz charges that the United States engages in “modified forms of torture that include physical and psychological components.”³³⁵ He then backs up his charge by citing newspaper articles that rely on unnamed sources.³³⁶ Certainly, there

³³⁰ See Bowden, *supra* note 108, at 74.

³³¹ Carlotta Gall, *Freed Afghan, 15, Recalls a Year at Guantanamo*, N.Y. TIMES INT’L, Feb. 11, 2004.

³³² Richard B. Schmitt, *Stiffer Terror Laws Urged; Despite a Rebuke of His Department, Ashcroft Calls for an Increase in Crimes Punishable by Life Terms of Death and New Power to Deny Bail*, L.A. TIMES, June 6, 2003, at A1. The vast majority of these aliens were deported. *Id.*

³³³ *Id.*

³³⁴ *Id.*; see also Kevin Johnson, *9/11 Detainee Abuse Limited Officials Say*, USA TODAY, June 26, 2003, at A4 (providing that Bureau of Prisons Director Jarley Lappin and Justice Department Inspector General Glenn Fine told a Senate Judiciary Committee that if abuses were substantiated the bureau would take “appropriate and decisive action”).

³³⁵ ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 135 (2004) [hereinafter DERSHOWITZ, *THE CASE FOR ISRAEL*].

³³⁶ *Id.* at 137.

have been isolated incidents of misconduct by soldiers and law enforcement personnel who acted outside of the scope of their sworn duty, but so far the government has shown a good faith effort to take corrective and disciplinary action when these cases are brought to light.³³⁷ Even the Army's own popular news magazine, the *Army Times*, reflected this matter by devoting the front cover of a January 2004 edition to four military police soldiers who were punished for abusing Iraqi prisoners.³³⁸ Additionally, the military is processing criminal charges against several soldiers as a result of the Abu Ghraib prison abuse scandal.³³⁹ The fact that some soldiers or government agents have engaged in misconduct does not mean that the government endorses or condones the practice.

IV. THE TICKING-TIME-BOMB SCENARIO

The old adage that it is better to free 100 guilty men than to imprison one innocent describes a calculus that our Constitution—which is no suicide pact³⁴⁰—does not impose on government when the 100 who are freed belong to terrorist cells that slaughter innocent civilians, and may well have access to chemical, biological, or nuclear weapons³⁴¹

Laurence H. Tribe

Some civil libertarians³⁴² seemingly underestimate the need for broader security measures in combating the al-Qāeda styled terrorist threat.³⁴³ Exaggerating the dangers to civil liberties, some even engage in inflammatory rhetoric by accusing the United States of “conducting assassinations

³³⁷ But see Cooperman, *supra* note 20, at A9 (discussing whether CIA interrogation techniques constitute torture).

³³⁸ See Jane McHugh, *Disgraced and Out*, ARMY TIMES, Jan. 19, 2004, at 1, 14 (describing the judicial punishment of four military police officers of the 320th Military Police Battalion for abusing detainees at Camp Bucca in southern Iraq).

³³⁹ See Angie Cannon & Chitra Ragavan, *A Big Legal Mess, Too*, US NEWS & WORLD REP., May 24, 2004, at 29.

³⁴⁰ “The Constitution is not a suicide pact” is commonly traced to Justice Jackson in *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

³⁴¹ Taylor, *supra* note 4, at 16 (quoting Laurence H. Tribe). Laurence H. Tribe is the Tyler Professor of Constitutional Law at Harvard University.

³⁴² See *supra* note 24 and accompanying text.

³⁴³ See Associated Press, *Amnesty International Says U.S., Others Have Used 9/11 to Erode Rights*, ST. LOUIS POST-DISPATCH, May 29, 2002, at A6.

. . . [and] sanctioning torture”³⁴⁴ in the War on Terror.³⁴⁵ Others, like Harvard Professor of Law Laurence Tribe, understand that concerns over civil liberties cannot be approached with a status quo mentality.³⁴⁶ Many legal scholars who understand the threat of al-Qáeda-styled terrorism often cite with approval former Supreme Court Justice Jackson’s observation that “the Constitution is not a suicide pact.”³⁴⁷

One issue that gains a tremendous amount of attention in this debate is how to deal with a suspected terrorist in a ticking time bomb scenario.³⁴⁸ Different commentators have varying turns on the theme,³⁴⁹ but it commonly goes something like this: Suppose a terrorist suspect is taken into custody in a major city and is found to be in possession of nuclear bomb-making materials and detailed maps of the downtown area. The terrorist tells police that he is a member of al-Qáeda and that a nuclear car bomb is on a timer set to detonate in ten hours (the time he had estimated he could safely escape the blast). The suspect then demands a lawyer and refuses to answer any more questions. Law enforcement may legitimately ignore his demands and conduct a reasonable interrogation as long as they do not engage in torture or ill-treatment, or employ techniques that would shock

³⁴⁴ Laura K. Donohue, *The British Traded Rights for Security, Too*, WASH. POST, Apr. 6, 2003, at B1.

“Like Britain, the United States today faces the charge that it does not respect individual rights. Its response to the terrorist attacks—shifting the presumption of innocence, conducting assassinations, limiting due process, engaging in inhumane behavior and sanctioning torture—does little to prove otherwise.”

Id. Laura Donohue is a fellow with the Center for International Security and Cooperation at Stanford University.

³⁴⁵ See, e.g., Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751 (2003) (providing that assassination, which is murder by surprise for political purposes, is not applicable to the act of killing al-Qáeda combatants even if by surprise).

³⁴⁶ Taylor, *supra* note 4, at 16.

³⁴⁷ See *supra* notes 340–41.

³⁴⁸ See, e.g., Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19.

³⁴⁹ See, e.g., Gross, *supra* note 82, at 102; see also DERSHOWITZ, *THE CASE FOR ISRAEL*, *supra* note 335; Thomas J. Lepri, *Safeguarding the Enemy Within: The Need for Procedural Protection for U.S. Citizens Detained as Enemy Combatants under Ex Parte Quirin*, 71 FORDHAM L. REV. 2565, 2594–95 (2003); Simmon Reichman, “*When We Sit to Judge We Are Being Judged*” *The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation*, 9 CARDOZO J. INT’L & COMP. L. 41, 56–57 (2001).

the conscience.³⁵⁰ But what if reasonable interrogation techniques yield no information—the suspect refuses to talk? This Hobson’s choice³⁵¹ poses one of the strongest arguments for the use of non-lethal torture.³⁵²

Given the premise of the ticking time bomb scenario, it is difficult to portray oneself as a centrist—either one uses whatever means necessary to procure the information to stop the blast or one simply allows the slaughter of innocent civilians. Should a reasonable law enforcement officer with spouse and children residing in the blast zone simply to resign himself to the fact that they are all going to perish since it is unlawful under both international and domestic law to use torture? Or is it more likely that the law officer faced with this scenario would in fact engage in torture and argue the defense of necessity at a subsequent criminal trial?

On the other hand, one might attempt to overcome the moral dilemma if the government created a justification defense which sanctioned the use of torture in special circumstances. In this manner one could eschew hypocrisy—the government would sanction the use of torture, and the law enforcement officer would not face prosecution for his acts.

A. *Israeli View*

The General Security Service of Israel (“GSS”)³⁵³ is responsible for conducting investigations of suspected terrorists who commit crimes against the State of Israel.³⁵⁴ As part of this responsibility, the GSS engages in the detention and interrogation of suspected terrorists. Up until the late 1980s the official position of the government of Israel was that GSS interrogators did not use “coercive” methods during terrorist interrogations.³⁵⁵ In 1987 the government appointed the Landau Commission³⁵⁶ to investigate the methods of interrogation used by the

³⁵⁰ See *supra* Part III.C.

³⁵¹ Making a Hobson’s choice requires a choice between two evils. See Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 143 (1972).

³⁵² See *supra* notes 22–24 and accompanying text.

³⁵³ GSS is also known as the Shin Bet. See generally Jason S. Greenberg, Note, *Torture of Terrorists in Israel: The United Nations and the Supreme Court of Israel Pave the Way for Human Rights to Trump Communitarianism*, 7 ILSA J. INT’L & COMP. L. 539, 540 (2001).

³⁵⁴ *Id.*

³⁵⁵ Clark, *supra* note 291, at 150.

³⁵⁶ See *Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, reprinted in 23 ISRAEL L. REV. 146 (1989). The commission was headed by Mr. Moshe Landau, a former

GSS.³⁵⁷ In November 1987 the Landau Commission issued its report, recognizing the terrorist threat to the nation and the attendant necessity for the GSS to engage in what it termed euphemistically as “a moderate measure of physical pressure”³⁵⁸ during interrogations of suspected terrorists. In a separate, secret part of the report,³⁵⁹ the Landau Commission set out limits to the types of physical pressure that the GSS might employ.³⁶⁰ In the publicly released section of the report, the commission advised that GSS agents should combine “non-violent psychological pressure of a vigorous and extensive interrogation . . . with . . . a moderate amount of physical pressure.”³⁶¹ In short, the Landau Commission provided the green light to the GSS to use “moderate . . . physical pressure”³⁶² when conducting interrogations.

Adopting the recommendations of the Landau Commission, the Israeli government issued directives authorizing the GSS to use various physical means in certain cases.³⁶³ In taking the unprecedented step of trying to regulate the use of physical pressure during the interrogation of suspected terrorists, the government contended that such methods did not constitute torture.³⁶⁴ The Supreme Court of Israel disagreed. According to the subsequent landmark case on the matter, *Public Committee*,³⁶⁵ the Supreme Court of Israel found that the primary techniques used by the GSS (which had until then remained secret) involved the following:

President of the Supreme Court of Israel.

³⁵⁷ The Landau Commission was prompted by two separate public scandals. The first related to the 1984 beating death of two Palestinians by GSS officers. The Palestinians had been taken into custody of the GSS after hijacking a civilian bus. The second related to the espionage case of an Israeli officer who had been forced by GSS officers to render a false confession under duress. See HUMAN RIGHTS WATCH, *TORTURE AND ILL-TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES* (1994), <http://www.hrw.org/reports/1994/israel/>.

³⁵⁸ *Id.*

³⁵⁹ Grosso, *supra* note 38, at 320.

³⁶⁰ Gross, *supra* note 82, at 120–22.

³⁶¹ Clark, *supra* note 291, at 151.

³⁶² *Id.* at 152.

³⁶³ See Tom Hundley, *Definition of 'Torture' Blurs: Coercion in Spain Hints at How Many Justify the Practice*, CHI. TRIB., Mar. 16, 2003, at 3.

³⁶⁴ See TAMAR GAULAN, *ISRAEL'S INTERROGATION POLICIES AND PRACTICES*, <http://www.mfa.gov.il/MFA/Government/Law/Legal%20Issues%20and%20Rulings/Israel-s%20Interrogation%20Policies%20and%20Practices%20-%20De> (Mar. 24, 2004).

³⁶⁵ See *Public Comm. Against Torture v. State of Israel*, 38 I.L.M. 1471 (1999).

(1) Shaking. The practice of shaking was deemed to be the most brutal and harshest of all the interrogation methods.³⁶⁶ The method is defined as “forceful shaking of the [suspect’s] upper torso, back and forth, in a manner that causes the neck and head to dangle and vacillate rapidly.”³⁶⁷

(2) Shabach Position. The practice of binding the subject in a child’s chair “titled forward, towards the ground.”³⁶⁸ This method is said to cause “serious muscle pain in the arms, the neck and headaches.”³⁶⁹ Other reports amplify the method and add that the subject’s head is “covered by a hood while powerfully deafening music is emitted within inches of the suspect’s head.”³⁷⁰

(3) Frog Crouch. The practice of making the subject crouch on the tips of his toes for five-minute intervals.³⁷¹

(4) Excessive Tightening of Handcuffs. The practice of inflicting injury to a suspect by excessive tightening of handcuffs or through the use of small handcuffs.³⁷²

(5) Sleep Deprivation. The practice of intentionally keeping the subject awake for prolonged periods of time.³⁷³

In ruling that there existed an absolute prohibition on the use of torture as a means of interrogation,³⁷⁴ the Supreme Court held some of the

³⁶⁶ Clark, *supra* note 291, at 102 n.44. The shaking of a suspect results in injuries similar to shaken baby syndrome in that “[t]he interrogator grabs the interrogee, who is sitting or standing, by the labels of his shirt, and shakes him violently, so that that the interrogator’s fists beat the chest of the interrogee, and his head is thrown backward and forward.” *Id.* An expert who testified before the court in *Public Committee* stated that “the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably, and suffer serious headaches.” *Public Comm. Against Torture*, 38 I.L.M. at 1474; see also Michael L. Gross, *Just and Jewish Warfare*, TIKKUN MAG., Sept.–Oct. 2001, <http://www.Tikkun.org/magazine/index.cfm/action/Tikkun/issue/Tik0109/article/010913c.html>.

³⁶⁷ See *Public Comm. Against Torture*, 38 I.L.M. at 1474; Gross, *supra* note 366.

³⁶⁸ *Public Comm. Against Torture*, 38 I.L.M. at 1475.

³⁶⁹ *Id.*

³⁷⁰ See generally Greenberg, *supra* note 353, at 549.

³⁷¹ *Public Comm. Against Torture*, 38 I.L.M. at 1475.

³⁷² *Id.*

³⁷³ *Id.* at 1476.

³⁷⁴ *Id.* at 1474.

Consequently, it is decided that the order *nisi* [prohibiting physical means of interrogation] be made absolute, as we declare that the GSS does not

practices of the GSS violated Israel's Basic Law: Human Dignity and Liberty.³⁷⁵ Specifically, the court found that shaking,³⁷⁶ the use of the Shabach,³⁷⁷ the use of the frog crouch,³⁷⁸ and, in certain instances, the deprivation of sleep,³⁷⁹ were all illegal and prohibited investigation methods.

Nevertheless, the Supreme Court of Israel was clearly apprehensive about the sweeping scope of its decision in *Public Committee*, particularly in the context of a ticking time bomb terrorist.³⁸⁰ In rendering its decision the court strongly signaled that the Knesset (legislative branch of Israel) might find it efficacious at some point to sanction physical means in interrogations "provided, of course, that a law infringing upon a suspect's liberty . . . is enacted for a proper purpose, and to an extent no greater than

have the authority to "shake" a man, hold him in the "Shabach" position [or] deprive him of sleep in a manner other than that which is inherently required by the interrogation.

Id.

³⁷⁵ *Id.* at 1476.

³⁷⁶ *Id.* at 1474.

³⁷⁷ See *supra* notes 367–69 and accompanying text. Michael L. Gross describes the Shabach as seating a suspect on a "small, low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspects back, and placed between the chair's seat and back support, the second hand is tied behind the chair, against the back support." Hoods soaked in urine and "powerfully loud music" were also commonly used simultaneously with the Shabach. Gross, *supra* note 366.

³⁷⁸ *Public Comm. Against Torture*, 38 I.L.M. at 1475. The court ruled that the frog crouch "is degrading and infringes upon an individual's human dignity." *Id.*

³⁷⁹ *Id.* at 1484–85. The court recognized that interrogation for a prolonged period of time is necessarily exhausting and an inevitable part of a normal interrogation process. Nevertheless, the court understood that sleep deprivation could be the basis for complaint. *Id.*

[Questioning the suspect for a prolonged period of time] is part of the "discomfort" inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator. . . . The above described situation is different from those in which sleep deprivation shifts from being a "side effect" inherent to the interrogation, to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or "breaking" him—it shall not fall within the scope of a fair and reasonable investigation.

Id. at 1484.

³⁸⁰ *Id.* at 1488 ("Our apprehension that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us.").

is required.”³⁸¹ To date, the Israeli legislature has not enacted any such legislation.

The Supreme Court of Israel went on to recognize the defense of necessity if individual GSS investigators employed such prohibited interrogation techniques in the case of a ticking time bomb scenario.³⁸² Citing Israeli penal law regarding necessity³⁸³—engaging in illegal conduct in order to promote a greater good—the Court recognized that GSS interrogators would have the right to raise the defense of necessity in a subsequent prosecution.³⁸⁴ The Court stated that “[o]ur decision does not negate the possibility that the ‘necessity’ defense be available to GSS investigators [in ticking-time-bomb scenarios] . . . if criminal charges are brought against them, as per the Court’s discretion.”³⁸⁵ The Court said “that if a GSS investigator—who applied physical interrogation methods for the purpose of saving human life—is criminally indicted, the ‘necessity’ [defense] is likely open to him in the appropriate circumstances.”³⁸⁶

Indeed, the Court seemed to anticipate that any reasonable GSS investigator, charged with protecting innocent lives, would apply “physical interrogation methods for the purpose of saving human life”³⁸⁷ when confronted with a ticking-time-bomb terrorist. In other words, GSS investigators would use whatever means necessary to avert the explosion

³⁸¹ *Id.* at 1476–77. The court accepted that

“[I]n the appropriate circumstances, GSS investigators may avail themselves of the ‘necessity’ defense, if criminally indicted [But here we] are not dealing with the potential criminal liability of a GSS investigator The question before us is whether it is possible to infer the authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of ‘necessity.’”

Id. at 1486.

³⁸² *Id.* at 1476–77.

³⁸³ Penal Law, Article 34(11) (1977). This Article states:

A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular circumstances, at the requisite [time], and absent alternative means for avoiding the harm.

Id.

³⁸⁴ *Public Comm. Against Torture*, 38 I.L.M. at 1477.

³⁸⁵ *Id.* at 1489.

³⁸⁶ *Id.* at 1486. The court went on to add that the ticking time bomb issue was “not the issue before the Court” and did not apply to the current issues at hand. *Id.* at 1490.

³⁸⁷ *Id.* at 1486.

of the bomb. The Court noted, however, that the threat of the explosion must be a “concrete level of imminent danger”:³⁸⁸

[The] “necessity” exception is likely to arise in instances of “ticking time bombs,” and that the immediate need . . . refers to the imminent nature of the act rather than the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided that the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion’s occurrence.³⁸⁹

B. The Defense of Necessity

The defense of necessity is a doctrine well known to the common law. Black’s Law Dictionary defines it as “[a] justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person’s actions.”³⁹⁰ A leading criminal law text amplifies this definition by explaining that “the harm done is justified by the fact that the action taken either accomplished a greater good or prevented a greater harm.”³⁹¹

The general understanding of the common law necessity defense was that it responded to circumstances emanating from the forces of nature and not from people.³⁹² When the pressure is from human beings, the defense, if applicable, is duress not necessity.

Today, the distinction between the pressure coming from nature or human beings has merged.³⁹³ The necessity defense extends to both instances.

[The reason for the defense is one of] public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 1485–86.

³⁹⁰ BLACK’S LAW DICTIONARY, *supra* note 5, at 1053.

³⁹¹ WAYNE R. LAFAYE, CRIMINAL LAW 449 (4th ed. 2003).

³⁹² *Id.* (“The necessity defense has sometimes been viewed as analogous to the defense of coercion, the essential difference between the two being that the former has to do with the pressure of natural physical forces, fire, while the latter has to do with a threat from a human agent.”).

³⁹³ *Id.* at 523.

...

The matter is often expressed in terms of choice of evils: when the pressure of circumstances presents one with a choice of evil, the law prefers that he avoid the greater evil by bringing about the lesser evil.³⁹⁴

Still, the necessity defense is unavailable to a defendant in situations where the legislature has previously made a determination of values.³⁹⁵ The Model Penal Code clearly states this concept: “[n]either the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.”³⁹⁶ For instance, a person may not take a human life in order to save himself.³⁹⁷

C. Professor Dershowitz’s View

Harvard Law School’s Alan Dershowitz has publicly advocated a far more aggressive approach to dealing with such things as the ticking-time-bomb terrorist.³⁹⁸ Dershowitz opposes the use of a necessity defense because relying on a necessity defense allows for torture to be carried on “beneath the radar screen,”³⁹⁹ which invites greater abuse by law enforcement agents. Without bantering words, Dershowitz advocates using nonlethal torture to obtain life saving information from a ticking time bomb terrorist.⁴⁰⁰ Dershowitz’s views have certainly spawned a firestorm of debate⁴⁰¹—not because he has advocated something new, but because it was

³⁹⁴ *Id.* at 524.

³⁹⁵ *Id.* at 525.

³⁹⁶ MODEL PENAL CODE § 3.02 (1985).

³⁹⁷ *See, e.g.,* The Queen v. Dudley 14 Q.B.D. 273, 274 (1884). Four seamen were cast away in a storm, one of them a seventeen-year old boy. Facing starvation, two of the defendants murdered the boy and all of the remaining three ate his flesh. The court rejected the necessity defense, ruling that it was their duty “to declare that the prisoners’ act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide.” *Id.* at 287–88.

³⁹⁸ *See* DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 24. For an excellent discussion, see Chanterelle Sung, Note, *Torturing the Ticking Time Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 B.C. THIRD WORLD L.J. 193 (2003).

³⁹⁹ DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 24, at 163.

⁴⁰⁰ *Id.* at 161. Dershowitz disagrees with those who “see silence as a virtue when it comes to the choice among such horrible evils as torture and terrorism.” *Id.*

⁴⁰¹ *See* William F. Schulz, *The Torturer’s Apprentice*, NATION, May 13, 2002, at 25, <http://www.thenation.com/doc.mhtml?i=20020513&s=schultz> (reviewing ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE (2002)).

Alan Dershowitz, the well-known civil libertarian,⁴⁰² who had made the case for State-sponsored torture.

According to Dershowitz, such instruments of non-lethal torture could include the use of “say, a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life.”⁴⁰³ The authority to engage in the non-lethal torture would come from a torture warrant issued by a judge.⁴⁰⁴ In this manner, Dershowitz argues that the process of torture is judicially sanctioned and the chances of abuse by individual investigators is thereby reduced:⁴⁰⁵ “I believe . . . that a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects.”⁴⁰⁶

Those who oppose torture under any circumstance, including the ticking time bomb scenario, invariably attempt to change or avoid the premise. Those who flatly reject Dershowitz’s proposal for judicial torture warrants for a ticking time bomb terrorist are prone to engage in avoidance.⁴⁰⁷ For example, a recent law review article noted that “[b]y expanding the narrow framework of Dershowitz’s inquiry, it is possible to focus our debate on alternative means of maintaining national security that do not violate [the] human dignity” of the terrorist.⁴⁰⁸ The only way to lessen the likelihood of a ticking-time-bomb scenario, of course, is to neutralize the bomb before the fuse is lit, that is, increasing police powers to break up the terrorist organizations and to prevent the unthinkable from coming to fruition.

The rule of law and democracy are cherished values that must be protected. Dershowitz, however, counters that in time of war it is some-

⁴⁰² DERSHOWITZ, *WHY TERRORISM WORKS*, *supra* note 24, at 141 (describing himself as a civil libertarian).

⁴⁰³ *Id.* at 144. “When I respond by describing the sterilized needle being shoved under the fingernails, the reaction is visceral and often visible—a shudder coupled with a facial gesture of disgust.” *Id.* at 148.

⁴⁰⁴ *Id.* at 141. “Moreover, if you believe that nonlethal torture is justifiable in the ticking bomb case, why not require advance judicial approval—a ‘torture warrant’?” *Id.*

⁴⁰⁵ *Id.* at 158.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 134–37 (anticipating this technique as a means to avoid making a difficult choice).

⁴⁰⁸ *See Sung, supra* note 398, at 196.

times necessary to, as Abraham Lincoln recognized, suspend our liberties to protect our liberties.⁴⁰⁹

Interestingly, Dershowitz's argument would require lawyers to chart a legal course around the Fourth, Fifth, and Fourteenth Amendment protections of the United States Constitution while simultaneously ignoring the binding obligations of the Torture Convention, that torture, under "[no] exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."⁴¹⁰

Dershowitz also fails to consider the matter of war crimes in his argument. To add judicial torture warrants to the corpus of America's rule of law would not only make a mockery of the rule of law, it would subject the United States to allegations of international war crimes. All of the existing international laws relating to armed conflict—including the Geneva Conventions,⁴¹¹ the Hague Conventions,⁴¹² and customary principles—are codified by the military in *Field Manual 27-10, Department of the Army Field Manual of the Law of Land Warfare* ("FM 27-10").⁴¹³ Violations of the law of war are labeled as war crimes.⁴¹⁴ FM 27-10 defines the term war crime as a "technical expression for a violation of the law of war by a person or persons, military or civilian."⁴¹⁵ War crimes are

⁴⁰⁹ REHNQUIST, *supra* note 1, at 48. Lincoln's most notorious violation of the Constitution is associated with his unilateral suspension of habeas corpus, which resulted in thousands of Northerners being arrested without charge or trial and imprisoned indefinitely. "On October 14, 1861, Lincoln wrote General Scott [the commander of all Union forces at that time] authorizing him to suspend the writ of habeas corpus 'anywhere between Bangor, Maine, and Washington.'" *Id.*

⁴¹⁰ *Torture Convention, supra* note 43, at art. 2.

⁴¹¹ The 1949 Geneva Conventions cover four categories: (1) Geneva Convention of Aug. 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; (2) Geneva Convention of Aug. 12, 1949 for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; (3) Geneva Convention of Aug. 12, 1949, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and (4) Geneva Convention of Aug. 12, 1949, Relative to the Protections of Civilian Persons in Time of War, 6 U.S.T. 3316, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

⁴¹² Hague No. IV of 1907.

⁴¹³ *See* FM 27-10, *supra* note 109.

⁴¹⁴ *Id.* ¶ 499.

⁴¹⁵ *Id.*

divided into simple breaches and grave breaches. The Geneva Conventions set out grave breaches to include such acts as torture or inhuman treatment, including biological experiments, or willfully causing great suffering or serious injury to body or health.⁴¹⁶ FM 27-10, paragraph 502 defines the following acts as "grave breaches," of the Geneva Convention of 1949 if committed against persons or property protected by the Conventions: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁴¹⁷

Each nation is under a strict legal obligation to search for all persons alleged to have committed war crimes and to investigate all allegations of war crimes.⁴¹⁸ If a grave breach of the law of war is discovered, then that nation must prosecute⁴¹⁹ or extradite the accused offender.⁴²⁰

If one accepts the premise that the United States is at war with the al-Qáeda network, then it certainly follows that the law of war is violated should an American investigator, civilian or military, engage in torture. Acts of torture constitute a grave breach of the law of war and the United States has an obligation to investigate and, if allegations of torture are valid, to either prosecute or extradite the offender to a nation that desires to prosecute. There are no exceptions for a ticking time bomb. The al-Qáeda are clearly illegal combatants, but that does not give the United States license to torture them.

D. A Right Thing Must Be Done in a Right Way

It is easy to choose between a right and a wrong, but the ticking time bomb scenario forces one to choose between the lesser of two wrongs. Disregarding the legal issues associated with torturing a ticking time bomb terrorist, is it possible to morally justify the use of torture to extract information? Those who believe so point to the so-called utilitarian principal best developed by philosopher Jeremy Bentham.⁴²¹ Under the

⁴¹⁶ *Id.* ¶ 502.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* ¶ 506.

⁴¹⁹ It is the policy of the United States that all military persons accused of grave breaches of the law of war are charged with the substantive crime under the Uniformed Code of Military Justice and prosecuted in a military courts martial.

⁴²⁰ Dep't of Army, Reg. 350-216, Training—The Geneva Conventions of 1949 and Hague No. IV of 1907, ¶ 5a (Mar. 7, 1975).

⁴²¹ THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12 (J.H. Burns & H.L.A. Hart eds., 1996).

concept of utilitarianism, the pain inflicted on the ticking time bomb terrorist by means of otherwise prohibited interrogation techniques is weighed against the potential pain and death that would be inflicted on the community. Those who believe that the community's welfare is of greater value than the welfare of the terrorist who seeks to destroy the community cite the utilitarian argument with approval.⁴²²

Many words in the English language describe a person who not only does the *right thing* in a given situation, but performs that action in the *right way*.⁴²³ Such a person may be described as exhibiting virtue, integrity, honor, and courage, just to name a few character traits. The formula of doing a right thing in a right way is an essential ingredient for the establishment and development of a just and democratic society based on the rule of law. Conversely, deviations from the formula are destructive to the individual and society. For instance, I regularly inform my students that getting an A on a Civil Procedure exam in law school is a right thing, but cheating to accomplish this goal can only be characterized as a wrong way to achieve the A. Thus, doing a right thing (getting an A) must be done in a right way (by studying and not cheating) or the result is wrong.

In dealing with the ticking time bomb terrorist scenario, the right thing is simple enough to appreciate—law enforcement must get the information that could save the lives of thousands or, if the bomb is a weapon of mass destruction, tens of thousands. The more difficult part of the formula is the second half—getting the needed information in the right way.

Prior to *Public Committee*, the Israeli government took the step of trying to regulate the use of torture, if not by means of a judicial torture warrant, then by administrative rules.⁴²⁴ In short, the government directives had provided a justification defense to an interrogator who engaged in torture. This practice was struck down as unlawful.⁴²⁵ A similar move to regulate torture in the United States would certainly meet the same end—a democracy cannot sanction torture. Once it does, it has abandoned the moral high ground; it is no longer a democracy. Whether justification flows from the legislative, executive or judicial branch, it is anathema to a freedom-loving people.

Drawn from the Israeli approach in *Public Committee*, a necessity defense would require him to satisfy a four pronged test: (1) the investiga-

⁴²² *Id.*

⁴²³ This excludes adherents to the post modernist approach which denies the existence of intrinsic or absolute values.

⁴²⁴ See CLARK, *supra* note 291, at 151.

⁴²⁵ See *Public Comm. Against Torture*, 38 I.L.M. at 1475.

tor had reasonable grounds to believe that the suspect had direct knowledge which could be used to prevent the weapon from detonating; (2) that the weapon posed an imminent danger to human life; (3) that there existed no alternative means of preventing the weapon from exploding; and (4) that the investigator was acting to save human life.⁴²⁶

V. CONCLUSION

*"If interrogators step over the line from coercion to outright torture, they should be held personally responsible. But no interrogator is ever going to be prosecuted for keeping Khalid Sheikh Mohammed awake, cold, alone, and uncomfortable. Nor should he be."*⁴²⁷

Mark Bowden

The balance between civil liberties and security demands has unquestionably changed. To be sure, the debate on where the balance should rest must be deliberate and inclusive of all voices, but the hard premise that accentuates the call for robust debate must rubricate the discussion—these al-Qáeda-styled fanatics are in our midst and mean to slaughter us wholesale if they can.⁴²⁸ Many know this fact well, yet they are naïve in considering the real world ramifications of advocating that no revisions need be made to existing authorities, laws, and processes. The pre-9/11 environment will certainly never return and evil forces of terror remain fixed on the horizon.⁴²⁹ Unfortunately, in the technological age of weapons of mass destruction, we need only be unlucky once for catastrophe to cripple the nation and the civilized world. As General Tommy Franks warned, such an event would "cause our population to question our own Constitution and to begin to militarize our country in order to avoid" another weapon of mass destruction event.⁴³⁰

Chief Justice William H. Rehnquist's quote at the beginning of this Article speaks to the challenge of achieving or maintaining a proper

⁴²⁶ See *id.* at 1482–89.

⁴²⁷ See Bowden, *supra* note 108, at 76.

⁴²⁸ See, e.g., Kaplan et al., *supra* note 194.

⁴²⁹ Dave Moniz & Tom Squitieri, *Defense Memo: A Grim Outlook*, USA TODAY, Oct. 22, 2003, at A1 (citing a two-page Secretary of Defense memorandum dated October 16, 2003 that spell out the difficulties fighting the war on terror).

⁴³⁰ Marvin R. Shanken, *General Tommy Franks*, CIGAR AFICIONADO, Nov./Dec. 2003, at 74.

balance between freedom and order in time of national crisis.⁴³¹ Rehnquist's words bear repeating: "In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being."⁴³² While his observation is undoubtedly correct in terms of past wars in our history, the uniqueness of the War on Terror poses a far more difficult dilemma for those concerned with civil liberties. The War on Terror may never "be over," so the on-going conflict presents a fundamentally new and potentially devastating threat to civil liberties. If the War on Terror has no end in sight, Rehnquist's premise that order must trump freedom in wartime could mean that freedoms quickly relinquished in this war may never return. Accordingly, calls for greater "order" must be carefully weighed, debated, and incrementally enacted.

More importantly, America's strongest weapon in the War on Terror does not rest with our military might or police functions. In the long run, America's strongest weapon is our uncompromising commitment to the freedoms and civil liberties embodied in our Constitution and reflected in the U.N. Charter. If we engage in tactics that violate the democratic principles that make up our rule of law are we different from the terrorists at our gates? The United States of America can only ride the crests of the waves of history so long as it follows a rule of law rooted in human rights and democratic principles. America will drown in the sea of hypocrisy if it trades civil liberties for a mess of pottage. Terrorism consultant Brian Jenkins agrees that the best defense against the terrorists calls for a "continuing commitment to the basic values that . . . the nation stands for."⁴³³

The purpose of detainee interrogation is to glean as much intelligence as possible from individuals who have information associated with the al-Qáeda terrorist network and all associated terror networks. The goal is to apprehend as many of the terrorists as possible and to prevent future acts of terror on our people with particular concern for the likelihood that our enemies will surely use weapons of mass destruction against us. The civilized world faces a relentless campaign by these apocalyptic terrorists who seek our destruction. To date, interrogations have yielded much valuable information. According to the Jacoby Declaration, as of January

⁴³¹ REHNQUIST, *supra* note 1.

⁴³² *Id.*

⁴³³ Richard Morin & Claudia Deane, *Professor of Chaos*, WASH. POST, June 1, 2003, at D5.

2003, the United States thwarted over 100 terrorist attacks worldwide based on information provided in part from detainee interrogations.⁴³⁴

One matter is fundamentally certain: if al-Qáeda is to be kept at bay, the United States must rely on detainee interrogation as an integral anti-terrorist tool.⁴³⁵ The need for the interrogator to get information to protect the lives of innocent people is a legitimate and perfectly lawful exercise. By its very nature, even the most reasonable interrogation places the detainee in emotional duress and causes stress in his being—both physical and mental. Still, a reasonable interrogation must necessarily be free of torture or ill-treatment. As new techniques are explored, the United States must develop methods that penetrate quickly the consciousness of the detainee without causing pain and suffering.

Those who regularly claim that the United States oversteps the line regarding torture and ill-treatment tend to invoke the worn slippery slope argument, but that does not mean that the potential for abuse does not exist. The old saw attributed to Lord Acton that power tends to corrupt is valid.⁴³⁶

In conclusion, judicious modifications to our civil liberties must be made in time of war. The War on Terror provides Americans an opportunity to reexamine much of what this nation represents to the world. The sanctioned use of torture must surely strike the vast majority as inconsistent with civilized values. Accordingly, while there could very well exist an emergency ticking-time-bomb scenario in which torture of a particular terrorist is necessary, the interrogator must face criminal liability. To approach the issue in any other manner would send the wrong signal to friends and foes alike. Those who believe that the United States can defend freedom by subverting our own values are as misguided as those who demand that the government fight the War on Terror without altering civil liberties by jot or tittle. Torture is illegal and must remain on the books as such.

⁴³⁴ Jacoby Declaration *supra* note 167.

⁴³⁵ See, e.g., Jack Solomon, *Interrogation Reveals How 9/11 Developed*, USA TODAY, Sept. 22, 2003, at A3.

⁴³⁶ See ROLAND HILL & OWEN CHADWICK, LORD ACTON (May 2002). "Power tends to corrupt; absolute power corrupts absolutely." Historian Lord Acton's epic warning was that political power is the most serious threat to liberty. Lord Acton (1834–1902) was born in Naples and educated in England, Scotland, France, and Germany, where he developed an extraordinary knowledge of European political history.